Supreme Court, U.S.
FILED

10-251 AUG 19 2010

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No. 10-___

IN THE
Supreme Court of the United States

EXPERIAN INFORMATION SOLUTIONS, INC.,
Petitioner,

v.

MARIA E. PINTOS,
Respondent.

On Petition for a Writ of Certiorari To the United States Court of Appeals For the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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AUGUST 19, 2010

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QUESTION PRESENTED

Under 15 U.S.C. § 1681b(a)(3)(A), a provision of the Fair Credit Reporting Act, a creditor in any "credit transaction involving [a] consumer" is authorized to obtain the consumer's credit report to assist in, *inter alia*, collecting the consumer's debt. The text of an accompanying subsection, § 1681b(c), makes clear that the authorization in § 1681b(a)(3)(A) extends to "credit . . . transactions that are not initiated by the consumer."

The question presented is whether the Ninth Circuit erred in holding, in the face of this express statutory language, that the authorization in § 1681b(a)(3)(A) applies only to transactions initiated by the consumer.

PARTIES TO THE PROCEEDING

The petitioner in this case is Experian Information Solutions, Inc., which was the defendant-appellee-cross-appellant below. Also party to the case below was defendant-appellee Pacific Creditors Association. The respondent in this case is Maria E. Pintos, who was the plaintiff-appellant-cross-appellee below.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioners disclose as follows:

Experian Information Solutions, Inc., is a wholly owned subsidiary of Experian plc. Experian plc is publicly traded on the London Stock Exchange. No other publicly traded corporation owns more than 10% of Experian Information Solutions, Inc.'s stock.

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OPINIONS BELOW

The order of the Ninth Circuit amending its opinion and denying rehearing en banc and its second amended opinion (Pet. App. 1a) are reported at 605 F.3d 665. The Ninth Circuit's first amended opinion (Pet. App. 30a) is reported at 565 F.3d 1106. The Ninth Circuit's original opinion (Pet. App. 52a) is reported at 504 F.3d 792. The district court's opinion (Pet. App. 69a) is unreported.

JURISDICTION

The court of appeals entered its original judgment on September 21, 2007. A timely petition for rehearing or rehearing en banc was filed. On April 30, 2009, the court of appeals entered its first amended judgment. A second petition for rehearing or rehearing en banc was denied on May 21, 2010, and the court of appeals entered its second amended judgment on that date. This court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 15, section 1681b, of the United States Code provides, in relevant part:

> (a) In general
>
> Subject to subsection (c) of this section, any consumer reporting agency may furnish a consumer report under the following circumstances and no other:
>
> . . . .
>
> (3) To a person which it has reason to believe—
>
> (A) intends to use the information in connection with a credit

> transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; . . . .

The full text of § 1681b is reproduced at Pet. App. 79a-96a.

STATEMENT

Under the Fair Credit Reporting Act (FCRA), a creditor in any "credit transaction involving [a] consumer" is authorized to obtain the consumer's credit report to assist in, *inter alia*, collecting the consumer's debt. 15 U.S.C. § 1681b(a)(3)(A). The text of an accompanying subsection of § 1681b makes clear that the "credit transaction[s]" in § 1681b(a)(3)(A) include "credit . . . transactions that are not initiated by the consumer." *See id.* § 1681b(c)(1).

Notwithstanding this express statutory language, the divided Ninth Circuit panel below held that a "credit transaction involving the consumer" under § 1681b must be one "the consumer initiate[d]." Pet. App. 15a-16a. And, despite a seven-judge dissent pointing out that this interpretation "is foreclosed by the plain language of the statute," Pet. App. 5a (Kozinski, C.J., dissenting from denial of reh'g en banc), the court below made no effort to square its holding with the contrary text of § 1681(b)(c). As Chief Judge Kozinski observed, this untenable reading of the FCRA—one the panel majority adopted, it is worth noting, only after withdrawing an opinion offering a completely different rationale for reaching the same result—"flunks Statutory Interpretation 101." Pet. App. 8a.

The decision below disregards both the language of the FCRA and this Court's repeated admonitions concerning the proper interpretation of statutes. It also conflicts with the interpretation of § 1681b by other circuits, and by the agency tasked with implementing and enforcing the statute—the Federal Trade Commission (FTC). And, as a practical matter, it drastically and unjustifiably narrows the circumstances under which a creditor may permissibly obtain a consumer's credit report, and injects disuniformity and uncertainty into the collection of consumer debts.

Petitioner respectfully submits that the Ninth Circuit's extreme departure from the text of the FCRA and from established principles of statutory interpretation calls for summary reversal by this Court, or, in the alternative, for correction after full briefing and argument.

1. "Congress enacted the FCRA [15 U.S.C. § 1681 *et seq.*] in 1970 to promote efficiency in the Nation's banking system and to protect consumer privacy." *TRW Inc. v. Andrews*, 534 U.S. 19, 23 (2001). To balance these sometimes competing goals, § 1681b of the FCRA creates rules defining the "permissible purposes" for which a "consumer report" (usually known colloquially as a "credit report") may be obtained. These permissible purposes include, *inter alia*, credit transactions, debt collection, employment, insurance, licensing, credit-risk valuation, business transactions, child support determinations, and court orders. *See* 15 U.S.C. § 1681b(a). Consumer reporting agencies are required to maintain "reasonable procedures" designed "to limit the

furnishing of consumer reports to" the permissible purposes listed in § 1681b. *Id.* § 1681e(a).

The provision at issue in this case, set forth in § 1681b(a)(3)(A), authorizes the furnishing of a credit report for various purposes related to consumer credit, including the collection of amounts owed by a consumer, *i.e.*:

> in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer.

In contrast to the accompanying subparagraph (F)(i) of § 1681b(a)(3), which limits the permissible purpose it creates to transactions "initiated by the consumer," subparagraph (A) contains no language concerning consumer initiation of the relevant transaction.

2. Respondent Maria E. Pintos owned a sport-utility vehicle with an expired registration that was illegally parked on the street and, at the direction of the San Bruno Police Department, was towed and impounded by P&S Towing. Pet App. 10a. When Pintos failed to claim her vehicle or pay for P&S's services, P&S, in accordance with California Civil Code §§ 3068.1, 3068.2, obtained a lien on the vehicle, sold it, and obtained a deficiency claim against Pintos. Pet. App. 10a. P&S assigned the deficiency claim to the defendant below, Pacific Creditors Association (PCA), for collection. *Id.* To assist in collecting the debt, PCA sought and obtained a credit report on Pintos from petitioner Experian—a credit reporting agency—on December 5, 2002. *Id.*

3. Pintos subsequently filed this action in the Northern District of California against petitioner and PCA, claiming that PCA's collection of her debt was not a "permissible purpose" for requesting her credit information, and that Experian had violated the FCRA by providing it to PCA. *Id.* On motions for summary judgment, PCA and Experian argued that collection of a debt was a permissible purpose under § 1681b(a)(3)(A), as confirmed by the Ninth Circuit's decision in *Hasbun v. County of Los Angeles*, 323 F.3d 801 (9th Cir. 2003). The district court granted the motion for summary judgment, holding—in conformity with the "uniform[]" case law addressing the issue—that debt collection is considered to be the "collection of an account" and is therefore a permissible purpose under § 1681b(a)(3)(A) to access a credit report. Pet. App. 74a. Pintos appealed.

a. In the first of its three eventual opinions in this case, the Ninth Circuit—while acknowledging its prior "determin[ation] [in *Hasbun*] that debt collection was generally a permissible purpose for obtaining credit reports under § 1681b(a)(3)(A)," Pet. App. 60a—held that collection of Pintos's debt was not a permissible purpose. Adopting a theory not briefed by either party, the court deemed its prior interpretation of § 1681b(a)(3)(A) in need of "reevaluat[ion]" in light of the Fair and Accurate Credit Transactions Act of 2003 (FACTA), Pub. L. 108-159, 111 Stat. 1952 (2004)—legislation not enacted until after the events at issue in this case. Pet. App. 60a. In particular, the court reasoned, FACTA's definition of the term "credit"—notwithstanding that the definition made no

reference to who initiated a credit transaction[1]—meant that the "credit transaction[s]" covered by § 1681b(a)(3)(A) included only those in which "the consumer directly participates and voluntarily seeks credit." Pet. App. 59a. Because Pintos did not incur her debt voluntarily, the court held, her credit report could not be permissibly obtained to collect it. *Id.* at 59a-60a.

b. On the defendants' petition for rehearing—which pointed out, among other things, that FACTA was enacted after the relevant events and therefore inapplicable—the Ninth Circuit withdrew its initial opinion and (over the dissent of Judge Bea, who replaced Judge Schiavelli on the panel following the initial panel opinion) filed a superseding opinion reaching the same result on yet another theory argued by neither party: that § 1681b(a)(3)(A)'s language requiring a "credit transaction involving the consumer" demands a transaction *initiated* by the consumer. Pet. App. 38a-39a. To distinguish *Hasbun*'s holding that § 1681b(a)(3)(A) applied to collection of a child support judgment—presumably not a "consumer initiated" debt under the majority's new test—the court carved out an exception for judgment debts; a debt reduced to judgment, the court held without explanation, would be deemed "a 'credit transaction involving the consumer' no matter how it arose." Pet. App. 41a. Applying its interpretation of the statute to the case at bar, the court held that there was no permissible purpose,

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[1] The definition is: "The term 'credit' means the right granted by a creditor to a debtor to defer payment of debt or to incur debts and defer its payment or to purchase property of services and defer payment therefore." 15 U.S.C. § 1691a(d).

because Pintos "never asked to have [her] vehicle towed" and PCA's lien had not been reduced to a judgment. *Id.* at 39a, 41a.

In dissent, Judge Bea argued that the majority had no coherent basis for its purported distinction of *Hasbun*. In addition, he noted, under the text of the statute Pintos was undoubtedly "involved" in a credit transaction by "her decision to leave her unregistered car on a public street where she knew it might be towed," which, Judge Bea explained, "*is* asking to have one's car towed." *Id.* at 49a. Under the uniform rule applied by other jurisdictions and the FTC and adopted in *Hasbun*, like "*any* creditor attempting to collect a debt from a consumer," P&S and PCA were "entitled to access Pintos's credit report in order to collect the debt." *Id.* at 50a-51a & n.1 (emphasis in original).

c. The defendants again sought rehearing or rehearing en banc. On May 21, 2010, the Ninth Circuit denied rehearing en banc and amended its opinion to add a footnote addressing the contention of the defendants (and seven dissenting judges) that the plain language of other sections of the FCRA—namely the "prescreening provisions," 15 U.S.C. §§ 1681a(m) and 1681b(c)—foreclosed the panel majority's new interpretation of § 1681b(a)(3)(A) as limited to transactions that the consumer initiated. Pet. App. 3a-4a, 17a n.2. The footnote declared that this argument had "not persuaded us to change our opinion," *id.*, but did not address how the panel squared its interpretation of § 1681b(a)(3)(A) with the other provisions of the statute.

Chief Judge Kozinski, writing for seven dissenting judges, argued that the majority's "interpretation of

the Fair Credit Reporting Act (FCRA) is foreclosed by the plain language of the statute." Pet. App. 5a. Under the statutory text, he explained, the majority's "holding that a person isn't 'involved' in a credit transaction unless he 'initiates' the transaction . . . . can't be squared with 15 U.S.C. § 1681b(c)," which specifically contemplates (and imposes certain restrictions on) the furnishing of consumer reports under § 1681b(a)(3)(A) "'*in connection with any credit . . . transaction that is not initiated by the consumer.*'" Pet. App. 5a-6a (quoting § 1681b(c), Chief Judge Kozinski's emphasis).

Chief Judge Kozinski concluded:

> Putting sections 1681b(a)(3)(A), 1681b(c) and 1681a(m) together, then, it's clear that: (1) Consumers can be "involved" in credit transactions under section 1681b(a)(3)(A) that they didn't initiate; (2) section 1681b(c) provides certain restrictions on access to reports under section 1681b(a)(3)(A) when the consumer didn't initiate the transaction; and (3) those limitations don't apply here because section 1681a(m) says that Pintos initiated the transaction.

Id. at 7a. "In holding otherwise, the majority flunks Statutory Interpretation 101." *Id.* at 7a-8a.

Judge Gould joined Chief Judge Kozinski's dissent, but also wrote separately to point out that the majority's distinction between judgment creditors and other creditors will inevitably increase the cost of consumer credit. "Uniformity of treatment of creditors is useful and likely leads to lower credit enforcement costs to the benefit ultimately of

consumers." *Id.* at 8a. Judge Gould explained: "Use of credit reports expedites collections, reducing collection costs, and because such costs may be shifted to consumers, permitting the credit reports to be relied upon by creditors may decrease costs to citizens who are so unfortunate as to leave their unregistered cars parked on the street and subject to towing." *Id.* In Judge Gould's view, "permitting credit reports to go to creditors, whether they have a judgment or not, will be less expensive for both debtors and creditors." *Id.*

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW RADICALLY DEPARTS FROM BOTH THE TEXT OF THE FCRA AND BINDING PRINCIPLES OF STATUTORY INTERPRETATION.

The decision below violates this Court's most basic rules of statutory interpretation by disregarding express statutory text—contained in the very same section of the statute the court below purported to interpret—that forecloses the court's preferred interpretation of the FCRA. Indeed, the contradiction between the panel majority's interpretation and the statutory text is so plain that, as Chief Judge Kozinski aptly put it, the majority's reading of the statute "flunks Statutory Interpretation 101." Pet. App. 8a (Kozinski, C.J., dissenting from denial of rehearing en banc). This extreme departure from the text of the FCRA and fundamental rules of interpretation calls for summary reversal by this Court, or, in the alternative, correction after full briefing and argument.

Section 1681b(a) of the FCRA authorizes a consumer reporting agency to furnish a consumer's credit report:

> (3) To a person which it has reason to believe—
>
> > (A) intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer.

15 U.S.C. § 1681b(a)(3)(A). As the Federal Trade Commission and courts have long recognized, this provision authorizes the furnishing of a consumer's credit report "for use in attempting to collect that consumer's debt." 16 C.F.R. pt. 600, App. § 604(3)(E) cmt. 1(A) (2002).[2]

The Ninth Circuit significantly restricted this statutory permissible purpose, holding that § 1681b(a)(3)(A) applies only to a subset of consumer debts, *i.e.*, those resulting from a "transaction initiated by" the consumer.[3] Pet. App. 15a. In its

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[2] *See also Hasbun*, 323 F.3d at 801; *Phillips v. Grendahl*, 312 F.3d 357, 367 (8th Cir. 2002); *Duncan v. Handmaker*, 149 F.3d 424, 428 (6th Cir. 1998).

[3] To be more precise, the Ninth Circuit required consumer initiation for all debts except judgment debts; once reduced to judgment, a debt would be deemed to be within § 1681b(a)(3)(A) "no matter how it arose." Pet App. 17a As discussed *infra*, the incoherence of this exception—and its inconsistency with the court's own reading of the statutory text—highlights the extent to which the decision below was unconstrained by either that text or the governing rules of interpretation.

apparent determination to narrow the scope of § 1681b(a)(3)(A)—the court adopted its current interpretation only after first attempting a completely different rationale for reaching the same result—the Ninth Circuit simply refused to apply fundamental interpretive principles required by this Court's cases.

1. As Chief Judge Kozinski ably demonstrated, in light of the express provisions of § 1681b(c), the panel's reading of § 1681b(a)(3)(A) as requiring that transactions be initiated by the consumer is untenable. Pet. App. 5a-8a. Section 1681b(c) specifically recognizes that "credit transaction[s] involving the consumer" within the meaning of § 1681b(a)(3)(A) *do* include transactions that are "not initiated by the consumer." Indeed, § 1681b(c) is expressly aimed at certain of those transactions, directing that:

> A consumer reporting agency may furnish a consumer report relating to any consumer *pursuant to subparagraph (A) or (C) of subsection (a)(3) of this section* [*i.e.*, § 1681b(a)(3)(A) or (C)] in connection with any *credit or insurance transaction that is not initiated by the consumer* only if—

certain requirements are met. 15 U.S.C. § 1681b(c)(1) (emphasis added).

Section 1681b(c) regulates so-called "prescreening," whereby lenders (or insurers) are permitted to purchase a list of consumers who have not initiated any transaction with the lender, but who meet certain "prescreening" criteria (*e.g.*, all consumers in a certain zip code with more than three credit cards

and a credit score greater than 700) for the purpose of offering credit to those consumers.[4] The prescreening provision does not itself create any independent permissible purpose for access to credit information. Rather, by its express terms, it applies where a permissible purpose exists under § 1681b(a)(3)(A) or (C) with respect to a "transaction that is not initiated by the consumer." As Chief Judge Kozinski explained: "Section 1681b(c) provides special limits on access to credit reports sought under section 1681b(a)(3)(A) when transactions aren't initiated by consumers. We therefore know that section 1681b(a)(3)(A) covers transactions not initiated by consumers." Pet. App. 7a.[5]

Chief Judge Kozinski's argument, we submit, is irrefutable: Interpreting § 1681b(a)(3)(A) as covering only transactions initiated by consumers is impossible in light of § 1681b(c). Apparently recognizing this, the panel majority made no attempt to demonstrate that its interpretation *could* be harmonized with § 1681b(c). Instead, it simply refused to interpret § 1681b(a)(3)(A) in light of § 1681b(c), offering as its only justification for this the (accurate but irrelevant) observation that Pintos's case did not involve prescreening. Pet. App. 17a n.2. The court did not contend that this made the text of

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[4] To access such prescreened lists, a lender must comply with certain special requirements set forth in § 1681b(c), including making "a firm offer of credit" to each consumer on the list.

[5] As Chief Judge Kozinski also noted, a companion provision, § 1681a(m), exempts debt collection from the special prescreening requirements of § 1681b(c). Pet. App. 6a-7a.

§ 1681b(c) any less decisive in foreclosing its reading of § 1681b(a)(3)(A).[6]

The Ninth Circuit's refusal to interpret § 1681b(a)(3)(A) in light of § 1681b(c) violates one of this Court's most fundamental rules of statutory interpretation. It is a "cardinal rule that a statute is to be read as a whole," *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991), and, "[j]ust as a single word cannot be read in isolation, nor can a single provision of a statute." *Smith v. United States*, 508 U.S. 223, 233 (1993). For example, in *Smith*, this Court held that a narrow interpretation of the term "uses" in 18 U.S.C. § 924(c)(1) was foreclosed by the provisions of another subsection of the statute. *Id.* at 234. Thus, as this Court has frequently emphasized: "'A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.'" *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004) (quoting *United*

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[6] It may be worth addressing the court's suggestion that prior to the final round of briefing, "[t]he parties did not appear to view [§§ 1681b(c) and 1681a(m)] to be relevant to this case." Pet. App. 17a n.2. Until the panel adopted a novel interpretation of § 1681b(a)(3)(A) that conflicts with § 1681(c), the provisions were indeed of limited relevance; and the subsequent petitions for rehearing, as contemplated by Fed. R. App. P. 35, focused on the reasons for en banc consideration rather than on the merits. In any event, the court reached the merits of petitioner's arguments based on these provisions and held that they had "not persuaded us." *Id.*

Savings Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 371 (1988)).

As Chief Judge Kozinski demonstrated, the panel majority's reading of § 1681b(a)(3)(A) is flatly inconsistent with § 1681b(c). The panel majority, of course, was free to disagree with that view (albeit it is difficult to see how a different view is possible, and the court made no effort to justify one). But it was not free—under either this Court's cases or elementary principles of interpretation—to insist on its preferred interpretation of § 1681b(a)(3)(A) without regard to whether that interpretation was "'compatible with the rest of the law,'" *Koons*, 543 U.S. at 60.

2. The text of § 1681b also demonstrates the error below in another way. The Ninth Circuit's interpretation of § 1681b(a)(3)(A) is belied by the striking contrast between § 1681b(a)(3)(A) and another provision in the very same subsection—and thereby runs afoul of yet another basic interpretive principle, that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Bates v. United States*, 522 U.S. 23, 29-30 (1997) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

In contrast to the absence from § 1681b(a)(3)(A) of any language requiring consumer initiation, § 1681b(a)(3)(F)(i)—which creates a permissible purpose to access a consumer report for a "legitimate business need"—is expressly limited to a "transaction that is initiated by the consumer." Notably, prior to

1996, that provision used language exactly parallel to § 1681b(a)(3)(A): "in connection with a business transaction *involving* the consumer." 15 U.S.C. § 1681b(3)(E) (1995) (currently codified at 15 U.S.C. § 1681b(a)(3)(F)) (emphasis added). Congress changed that language in 1996 to the current "initiated by the consumer," but chose not to make a similar change to § 1681b(a)(3)(A).[7] The presumption that Congress acts intentionally when it "includes particular language in one section of a statute but omits it in another," *Bates*, 522 U.S. at 24, is particularly compelling under these circumstances, and particularly damning to the Ninth Circuit's textually insupportable interpretation here. *See also, e.g.*, 2A Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutes and Statutory Construction* § 46:5 (7th ed. 2010) ("[W]here the legislature has employed a term in one place and excluded it in another, it should not be implied where excluded."); *Markham v. Cabell*, 326 U.S. 404, 411 (1945) ("[T]he normal assumption is that where Congress amends only one section of a law, leaving another untouched, the two were designed to function as parts of an integrated whole.").

3. Finally, the Ninth Circuit's interpretation of § 1681a(b)(3)(A) is contradicted by its own holding, with respect to judgment debts, that "[i]f a debt has been judicially established, there is a 'credit transaction involving the consumer' no matter how it arose," Pet. App. 17a—*i.e.*, regardless of whether the transaction creating the debt was initiated by the consumer. The panel majority did not identify any

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[7] *See* Consumer Credit Reporting Reform Act of 1996, Pub. L. No. 104-208, § 2403(a)(2), 110 Stat. 3009-430 (1996).

basis in the statutory text for treating judgment debts differently, or explain how the phrase "credit transaction involving the consumer" could be coherently interpreted to *include* a judgment debt that is not consumer-initiated but *exclude* the same debt before it is reduced to judgment. In short, the Ninth Circuit's exception for judgment debts further demonstrates its decision's complete divorce from statutory text and binding interpretive principles.

II. THE DECISION BELOW CONFLICTS WITH THE INTERPRETATIONS OF OTHER COURTS AND THE FTC.

If the Court does not summarily reverse the decision below, it should grant certiorari for the additional reason that the Ninth Circuit's interpretation of § 1681b(a)(3)(A) conflicts with the approach taken by other circuit courts and by the FTC, and creates confusion on a federal question of considerable importance to businesses.

A. The Decision Below Departs From The Interpretations Of Other Circuits

In contrast with the decision below, several circuits have interpreted § 1681b(a)(3)(A) without qualification as making debt collection a permissible purpose for obtaining a consumer's credit report. *See Phillips v. Grendahl*, 312 F.3d 357, 366 (8th Cir. 2002) ("'collection of an account of[] the consumer'—in other words, debt collection," is a permissible purpose); *Duncan v. Handmaker*, 149 F.3d 424, 428 (6th Cir. 1998) (recognizing "collection of a debt owed by the consumer" as permissible purpose); *see also Miller v. Wolpoff & Abramson, LLP*, 309 F. App'x 40, 43 (7th Cir. 2009) (collection agency had permissible

purpose to access credit report for debt collection) (unpublished).[8]

The rule in these cases has been applied to allow creditors to obtain debtors' credit reports where the debt was incurred involuntarily and was not reduced to judgment. In *Lusk v. TRW, Inc.*, for example, the Sixth Circuit held that a landlord had a permissible purpose to access a tenant's credit report to collect money possibly due for damages to the apartment—even though the debt was contested and had not been reduced to judgment. 173 F.3d 429 (6th Cir. 1999) (unpublished table decision). And in *Dumas v. City of Chicago*, the Seventh Circuit held that the city had a permissible purpose to access a property owner's credit report in an effort to collect on a delinquent water bill incurred by the former owner of the property, even though the current owner "never sought credit" from the city. 234 F.3d 1272 (7th Cir. 2000) (unpublished table decision).

B. The Decision Below Conflicts With The FTC's Interpretation

The decision below also conflicts with the FTC's interpretive guidance on § 1681b(a)(3)(A).

The FTC commentary on § 1681b(a)(3)(A) states without qualification that "[a] collection agency has a

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[8] The Ninth Circuit quoted dicta in a Seventh Circuit decision observing that to access a credit report in connection with the potential extension of credit to a consumer, "[a]n entity may rely on subparagraph (3)(A) only if the consumer initiates the transaction." *Stergiopoulos v. First Midwest Bancorp., Inc.*, 427 F.3d 1043, 1047 (7th Cir. 2005). However, the quoted language was merely an observation about how loans are typically initiated; it did not purport to be an interpretation of any requirement of § 1681b(a)(3)(A).

permissible purpose under this section to receive a consumer report on a consumer for use in attempting to collect that consumer's debt." 16 C.F.R. pt. 600, App. § 604(3)(A) cmt. 1 (2002). It likewise states unequivocally that § 1681b(a)(3)(A) provides a permissible purpose in exactly the type of situation at issue in this case: collection on a lien. The FTC explained that § 1681b(a)(3)(A) "permits judgment creditors and *lien creditors* to obtain consumer reports on judgment debtors or individuals whose property is subject to the lien creditor's lien." *Id.*, App. § 604(3)(E) cmt. 4 (emphasis added).

Moreover, the FTC has rejected the distinction drawn—without explanation—by the court below between "judgment creditors" and other creditors. The FTC explained: "A judgment creditor has a permissible purpose to receive a consumer report on the judgment debtor for use in connection with collection of the judgment debt, *because it is in the same position as any creditor attempting to collect a debt* from a consumer who is the subject of a consumer report." 16 C.F.R. pt. 600, App. § 604(3)(A) cmt. 2 (2002) (emphasis added).

Although this interpretive guidance is not the product of formal rulemaking, *see* 16 C.F.R. § 600.2, it "nevertheless warrant[s] respect." *Washington State Dep't of Soc. & Health Servs. v. Keffeler*, 537 U.S. 371, 385 (2003); *see also United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (noting that administrative decisions not subject to *Chevron* deference may be entitled to a lesser degree of deference and that, following *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), the agency position should be followed to the extent persuasive). At a

minimum, the FTC's guidance reinforces both the erroneous nature of the decision below, and the harm to businesses that have structured their operations in reliance on the FTC's guidance.

III. THE QUESTION PRESENTED IS AN IMPORTANT ONE THAT REQUIRES THIS COURT'S IMMEDIATE ATTENTION.

The harm resulting from the decision below is considerable. The Ninth Circuit's decision—based on an untenable interpretation of the FCRA—imposes confusing and disuniform rules on nationwide businesses, strips creditors of a traditional and important tool for the efficient collection of many types of debt, and invites forum-shopping in FCRA suits. Correction by this Court is urgently needed.

The confusion created by the decision below is substantial. As a trade magazine observed more than a year after the initial panel decision, "[t]he Ninth Circuit decision in *Pintos v. Pacific Creditors Association* in 2007 continues to affect the way credit and collection agencies handle consumer accounts, generating a great deal of confusion about their ability to obtain a consumer's credit report for collection purposes." Anne Rosso, *Weathering the Storm*, Collector Magazine, Vol. 74, No. 5, at 24 (Dec. 2008); *see also* Pulse Vol. 26, No. 4, at 1 (Apr. 2010) ("many questions" raised by *Pintos*); Gary Nitzkin, *Pulling Credit Bureaus Just Got Even More Dangerous*, Michigan Collection Law Blog (Oct. 25, 2007) ("As a general rule, it used to be that a collector could pull a credit report on any debtor. This is an easy concept. This is not the law anymore.") (http://www.michigancollectionlawblog.com/2007/10/pulling_credit_bureaus_just_go.html).

In addition, the "permissible purpose" invalidated by the decision below has traditionally been relied on as a valuable tool for the collection of a wide range of taxes, liens, and other "involuntary" debts. Creditors use consumer reports to find difficult-to-locate debtors, determine their ability to pay existing obligations, and facilitate collection efforts. Without access to consumer reports, these creditors will be left to rely on "skip-tracing" techniques to track down debtors that are far more costly and less accurate and current than consumer reports. Likewise, the burden on the judicial system will increase as lien holders and other creditors seek the assistance of the courts in locating and collecting from debtors through increased garnishment, execution, and attachment proceedings.

Moreover, the conflict created by the decision below imposes disuniformities on nationwide businesses that use credit reports to collect consumer debts, as well as on the nationwide consumer reporting agencies that furnish those reports. Because so many FCRA suits are brought as putative nationwide class actions—and forum-shopping plaintiffs can easily file suit in the Ninth Circuit—any company amenable to suit within the Ninth Circuit must consider the implications of the decision below, even if it accesses consumer reports to collect involuntarily incurred debts elsewhere. The exposure to suit in multiple jurisdictions with disparate rules for the use of credit reports threatens to skew decision-making by businesses nationwide.

Finally, nothing in the 2003 FACTA amendments mitigates the need for this Court to resolve the question presented in this case. Notwithstanding the

original panel opinion purporting to find justification for a narrowing of § 1681b(a)(3)(A) in FACTA's definition of "credit," nothing in FACTA can change the result compelled by § 1681b(c)—to wit, that § 1681b(a)(3)(A) cannot be read as requiring consumer initiation in light of the express recognition in § 1681b(c) that § 1681b(a)(3)(A) does *not* require consumer initiation.

Moreover, § 1681b(c) aside, there is nothing in FACTA's definition of "credit," 15 U.S.C. § 1691a(d), that has any legitimate effect on whether § 1681b(a)(3)(A) requires a "voluntary" or "consumer initiated" debt. That definition—"the right granted by a creditor to a debtor to defer payment of debt or to incur debts and defer its payment or to purchase property or services and defer payment therefor"—says nothing about the debt being voluntarily assumed or the need for a consumer to initiate the transaction giving rise to the debt. Indeed, the definition is phrased in language—"the right granted by a creditor to a debtor"—that is most naturally read to include the *unilateral* granting of a right to defer payment. And the definition specifically includes the provision of services before payment, without regard to whether those services were voluntarily sought out by the consumer. *See Murray v. New Cingular Wireless Servs., Inc.*, 523 F.3d 719, 722 (7th Cir. 2008) ("Deferred payment is 'credit' as the statute uses that word.").

In short, the FACTA amendments have no bearing on the question presented in this case, and do nothing to mitigate the need for this Court's correction of the serious wrong turn taken by the Ninth Circuit below.

CONCLUSION

The petition for a writ of certiorari should be granted and the court of appeals' judgment summarily reversed or, in the alternative, the case should be set for full consideration on the merits.

Respectfully submitted,

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AUGUST 19, 2010

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MARIA E. PINTOS, *Plaintiff-Appellant,* v. PACIFIC CREDITORS ASSOCIATION; EXPERIAN INFORMATION SOLUTIONS, INC., *Defendants-Appellees.*	No. 04-17485 D.C. No. CV-03-05471-CW
MARIA E. PINTOS, *Plaintiff-Appellee,* v. PACIFIC CREDITORS ASSOCIATION, *Defendant,* and EXPERIAN INFORMATION SOLUTIONS, INC., *Defendant-Appellant.*	No. 04-17558 D.C. No. CV-03-05471-CW ORDER AMENDING OPINION AND DENYING REHEARING AND AMENDED OPINION

Appeal from the United States District Court
for the Northern District of California
Claudia Wilken, District Judge, Presiding

Argued and Submitted
January 9, 2007—San Francisco, California

Filed April 30, 2009
Amended May 21, 2010

Before: Mary M. Schroeder, Richard R. Clifton, and Carlos T. Bea, Circuit Judges.*

Order;
Dissent to Order by Chief Judge Kozinski;
Dissent to Order by Judge Gould;
Opinion by Judge Clifton;
Dissent by Judge Bea

COUNSEL

Andrew J. Ogilvie (argued), Kemnitzer, Anderson, Barron, Ogilvie & Brewer, LLP, San Francisco,

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* George P. Schiavelli, who was previously a member of this panel sitting by designation while serving as a United States District Judge for the Central District of California, resigned on October 5, 2008. Judge Bea was drawn by lot to replace him, pursuant to our General Order 3.2(g).

California, for appellant/cross-appellee Maria E. Pintos.

Daniel J. McLoon (argued), Jones Day, Los Angeles, California, Adam R. Sand and Marc S. Carlson, Jones Day, San Francisco, California, for appellee/cross-appellant Experian Information Solutions, Inc.

Andrew M. Steinheimer (argued) and Mark E. Ellis, Ellis Coleman Poirier LaVoie & Steinheimer, LLP, Sacramento, California, for appellee Pacific Creditors Association.

ORDER

This court's opinion, filed April 30, 2009, is amended by adding additional language to footnote 2 (565 F.3d at 1114). The existing text in footnote 2 will become the first paragraph of the footnote and the new language follows, such that the entire footnote reads:

> In this appeal of a summary judgment, PCA and Experian argued only that § 1681b(a)(3)(A) authorized PCA to obtain Pintos's credit report. Thus, we need not determine whether PCA had a permissible purpose under any other § 1681b subsection. On remand, Defendants may argue that PCA was authorized to obtain Pintos's report under a different subsection.
>
> In the briefs on the merits, oral argument, petitions for rehearing, and response to petitions for rehearing, there was no argument based on 15 U.S.C. §§ 1681a(m) and 1681b(c). The parties did not appear to

view those provisions to be relevant to this case. During our court's consideration of the petitions for rehearing en banc, it was suggested that these provisions, though drafted at a different time and aimed at a different situation, might shed light on the meaning of the relevant statute, § 1681b(a)(3)(A), so we requested supplemental briefs on that subject. The supplemental briefs have not persuaded us to change our opinion.

Those other provisions, §§ 1681a(m) and 1681b(c), were added in 1996 to permit lenders and insurance companies to solicit for business by purchasing lists and limited information about customers who match certain criteria (such as zip code and credit score) from credit reporting agencies. The "prescreened" customers could then be sent, for example, a "pre-approved" credit card solicitation. Pintos did not authorize the reporting agency to supply her report and the transaction did not consist of "a firm offer of credit or insurance," under § 1681b(c). Nobody contends otherwise.

At the same time, it should be clear that we do not opine on the meaning or scope of 15 U.S.C. §§ 1681a(m) and 1681b(c) or on the practice of obtaining information from credit reporting agencies to permit the extension of offers to prescreened customers, which the parties to our case agree is authorized by those statutes. A case presenting those questions is not before us.

A judge of the court called for a vote on the petitions for rehearing en banc. A vote was taken, and a majority of the active judges of the court failed to vote for en banc rehearing. Fed. R. App. P. 35.

The petitions for rehearing en banc are DENIED. No further petitions for rehearing may be filed.

Chief Judge KOZINSKI, with whom Judges O'SCANNLAIN, KLEINFELD, GOULD, TALLMAN, CALLAHAN and BEA join, dissenting from the denial of rehearing en banc:

Judge Bea's dissent persuasively explains why the majority opinion conflicts with Ninth Circuit precedent, and I would join it if I could. *Pintos* v. *Pac. Creditors Ass'n*, 565 F.3d 1106, 1117-18 (9th Cir. 2009) (Bea, J., dissenting). I write separately to point out another problem with the opinion: Its interpretation of the Fair Credit Reporting Act (FCRA) is foreclosed by the plain language of the statute.

The issue is whether Pacific Creditors Association (PCA) had a permissible purpose for seeking Maria Pintos's credit report. *Id.* at 1110 (maj. op.). PCA argued it had one under 15 U.S.C. § 1681b(a)(3)(A), which allows a consumer reporting agency to give a report to a person it has reason to believe "intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer." The majority disagreed, holding that a person isn't "involved" in a credit transaction unless he "initiates" the transaction. *Pintos*, 565 F.3d at 1112-13. Because Pintos didn't

ask to have her car towed, she didn't initiate her debt and there was no permissible purpose. *Id.* at 1113.

The majority's interpretation can't be squared with 15 U.S.C. § 1681b(c). This section provides that "[a] consumer reporting agency may furnish a consumer report relating to any consumer *pursuant to subparagraph (A) . . . of subsection (a)(3) [section 1681b(a)(3)(A)]* of this section *in connection with any credit . . . transaction that is not initiated by the consumer* only if" certain conditions are met. (Emphasis added.) Section 1681b(c) restricts the permissible purpose established in section 1681b(a)(3)(A) when transactions aren't consumer-initiated. And by limiting access to reports under section 1681b(a)(3)(A) in situations where the consumer didn't initiate the transaction, section 1681b(c) clues us in on the fact that section 1681b(a)(3)(A) doesn't *itself* require that consumers initiate anything.

Moreover, debt collectors like PCA don't even need to meet section 1681b(c)'s special conditions. Title 15 U.S.C. § 1681a(m) defines "credit . . . transaction that is not initiated by the consumer," and it specifically excludes "the use of a consumer report by a person with which the consumer has an account . . . for purposes of . . . collecting the account" from the definition of non-consumer-initiated transactions. 15 U.S.C. § 1681a(m). And "collection of a debt is considered to be the 'collection of an account.' " *Hasbun* v. *County of Los Angeles*, 323 F.3d 801, 803 (9th Cir. 2003). Because PCA was collecting Pintos's debt, the transaction here isn't one "not initiated by the consumer" that has to meet section 1681b(c)'s conditions. Indeed, independent of the conflict with

section 1681b(a)(3)(A), the majority's decision can't be reconciled with section 1681a(m): The majority holds that there was no permissible purpose because Pintos didn't initiate the transaction, but under section 1681a(m), Pintos did initiate the transaction by owing the debt.

Putting sections 1681b(a)(3)(A), 1681b(c) and 1681a(m) together, then, it's clear that: (1) Consumers can be "involved" in credit transactions under section 1681b(a)(3)(A) that they didn't initiate; (2) section 1681b(c) provides certain restrictions on access to reports under section 1681b(a)(3)(A) when the consumer didn't initiate the transaction; and (3) those limitations don't apply here because section 1681a(m) says that Pintos initiated the transaction.

The majority must have read these provisions, yet still disagrees. Its mistake is plain. If subparagraph A of a statute said "all fruit shall be inspected before it can be put into a dessert," and subparagraph B said "in the case of tomatoes inspected under subparagraph A, authorities shall perform extra special inspections," we'd know that subparagraph A covers tomatoes. Section 1681b(c) provides special limits on access to credit reports sought under section 1681b(a)(3)(A) when transactions aren't initiated by consumers. We therefore know that section 1681b(a)(3)(A) covers transactions not initiated by consumers. And if a statute expressly excluded golf from its definition of "fun sports," we couldn't hold that golf is a fun sport. Section 1681a(m) expressly excludes debt-collection transactions from its definition of non-consumer-initiated transactions. We therefore can't say that a debt-collection transaction was non-consumer-initiated. In holding

otherwise, the majority flunks Statutory Interpretation 101.

GOULD, Circuit Judge, dissenting from denial of rehearing en banc:

I also dissent from denial of rehearing en banc. With Chief Judge Kozinski, I agree with the reasoning of Judge Bea in his panel dissent. I also agree with the reasoning of the Chief Judge in his dissent from denial of rehearing en banc. I add this idea: Uniformity of treatment of creditors is useful and likely leads to lower credit enforcement costs to the benefit ultimately of consumers. I don't see a virtue in distinguishing *Hasbun* and establishing different categories of creditors, some of whom can gain access to a credit report and some of whom can't. Use of credit reports expedites collections, reducing collection costs, and because such costs may be shifted to consumers, permitting the credit reports to be relied upon by creditors may decrease costs to citizens who are so unfortunate as to leave their unregistered cars parked on the street and subject to towing. If a collection agency standing in the shoes of the towing company is not allowed to request and see a credit report, then the costs of collection are going to increase, then correspondingly the costs of towing are going to increase, and finally the scope of fines for violators would likely be increased. In my view, permitting credit reports to go to creditors, whether they have a judgment or not, will be less expensive for both debtors and creditors.

OPINION

CLIFTON, Circuit Judge:

Maria E. Pintos appeals the district court's summary adjudication of her claims under the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 et seq. Pintos contends that Pacific Creditors Association ("PCA") violated the FCRA by obtaining, without any FCRA-sanctioned purpose, a credit report on her from Experian Information Solutions, Inc., a credit reporting agency. Pintos also argues that Experian violated the FCRA by furnishing the report to PCA.

The district court granted summary judgment in favor of the defendants, concluding that PCA was authorized to obtain Pintos's credit report under the FCRA, which allows for the furnishing of reports "in connection with a credit transaction involving the consumer . . . and involving the . . . collection of an account of[ ] the consumer." 15 U.S.C. § 1681b(a)(3)(A). The district court determined that the transaction involved the collection of an account, relying upon our decision in *Hasbun v. County of Los Angeles*, 323 F.3d 801 (9th Cir. 2003). We conclude that *Hasbun* is more limited, however. Because the current case involves neither a transaction for which Pintos sought credit nor the collection of a judgment debt, we conclude that § 1681b(a)(3)(A) did not authorize PCA to obtain the credit report on Pintos. Thus, we vacate the judgment of the district court and remand for further proceedings regarding the defendants' liability. We also vacate the district court's order regarding Experian's motion to seal certain documents and remand for consideration under the proper legal standard.

I. Background

Police officers found a sport utility vehicle belonging to Pintos parked on the street in San Bruno, California, on May 29, 2002. The vehicle's registration was expired. At police direction, the vehicle was towed, and the towing company, P&S Towing, obtained a lien on the vehicle for towing and impound costs. P&S later sold the vehicle when Pintos failed to reclaim it or pay the outstanding charges. Since the vehicle's sale price did not cover the amount owed, P&S asserted a deficiency claim against Pintos and later transferred that claim to PCA, a collection agency.[1]

PCA sought and obtained a credit report on Pintos from Experian on December 5, 2002, in connection with its effort to collect on the debt assigned by P&S. Pintos subsequently filed a complaint against PCA and Experian under the FCRA. She alleged that PCA violated the FCRA by obtaining her credit report without any FCRA-sanctioned purpose and that Experian was liable for providing the report to PCA.

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[1] California Civil Code § 3068.1(a) provides for liens "dependent upon possession for the compensation to which [a] person is legally entitled for towing, storage, or labor associated with recovery or load salvage of any vehicle subject to registration that has been authorized to be removed by a public agency." The statute also allows for lien sales with varying procedures dependant on the value of the vehicle towed and stored. *See id.* §§ 3068.1(b)-3068.1(c). In addition, a tow truck operator with a lien pursuant to § 3068.1 "has a deficiency claim against the registered owner of the vehicle if the vehicle is not leased or leased with a driver for an amount equal to the towing and storage charges, not to exceed 120 days of storage . . . less the amount received from the sale of the vehicle." *Id.* § 3068.2(a).

PCA and Experian filed separate motions for summary judgment. Both argued that, under 15 U.S.C. § 1681b(a)(3)(A), PCA had a permissible purpose for obtaining Pintos's credit report because it was seeking to collect a debt, the towing deficiency claim. Experian further argued that it was not liable for a violation because it had fulfilled its obligations under 15 U.S.C. § 1681e, which immunizes a reporting agency against FCRA violations by the agency's subscribers so long as the agency takes certain steps.

Pintos filed a cross-motion for partial summary judgment on the issues of permissible purpose and Experian's alleged negligence. She attached to that motion several Experian documents detailing the company's internal procedures for complying with its FCRA obligations. Claiming these documents were confidential and proprietary, Experian filed a motion to seal them.

The district court granted the defendants' motions for summary judgment on November 9, 2004. Citing *Hasbun*, the court agreed that § 1681b(a)(3)(A) permitted PCA to obtain Pintos's credit report. The court denied Experian's motion to seal documents, without explanation.

Pintos filed a timely notice of appeal on December 8, 2004. Experian cross-appealed the district court's denial of its motion to seal on December 9, 2004. It also sought reconsideration by the district court of the denial of that motion. On April 29, 2005, the district court held that it lacked jurisdiction over the matter since Experian already appealed the order to this court. Nevertheless, the court stated that, if it had jurisdiction, it would grant Experian's motion

under *Phillips ex rel. Estates of Byrd v. General Motors Corp.*, 307 F.3d 1206 (9th Cir. 2002), and it stayed its prior order on the subject pending the appeal.

II. Discussion

We review grants of summary judgment de novo. *ACLU v. City of Las Vegas*, 466 F.3d 784, 790 (9th Cir. 2006). Cross-motions for summary judgment are evaluated separately under this same standard. *Id.* at 790-91; *Hoopa Valley Indian Tribe v. Ryan*, 415 F.3d 986, 989-90 (9th Cir. 2005).

A. 15 U.S.C. § 1681b(a)(3)(A)

[1] "Congress enacted the FCRA in 1970 to promote efficiency in the Nation's banking system and to protect consumer privacy." *TRW Inc. v. Andrews*, 534 U.S. 19, 23 (2001). Those two goals lie in tension, and the FCRA strikes a balance between them. The Act authorizes credit reporting agencies to "furnish . . . consumer report[s]" because "[c]onsumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers." 15 U.S.C. §§ 1681(a)(3), 1681b(a). At the same time, the FCRA "requir[es] credit reporting agencies to maintain reasonable procedures designed to assure maximum possible accuracy of the information contained in credit reports." *Andrews*, 534 U.S. at 23 (citations and internal quotation marks omitted). Importantly for this case, the FCRA permits agencies to furnish credit reports only for "certain statutorily enumerated purposes." *Id.*

The statutory limitation on the furnishing of credit reports is particularly relevant here, as the parties dispute whether PCA had a permissible purpose in

obtaining Pintos's credit report. Defendants contend that it did, under 15 U.S.C. § 1681b(a)(3)(A):

> (a) In general
>
> Subject to subsection (c) of this section, any consumer reporting agency may furnish a consumer report under the following circumstances and no other:
>
> ***
>
> (3) To a person which it has reason to believe—
>
> (A) intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer;

[2] To qualify under § 1681b(a), the "credit transaction" must both (1) be "a credit transaction involving the consumer on whom the information is to be furnished" and (2) involve "the extension of credit to, or review or collection of an account of, the consumer." Concluding that the transaction here involved the "collection of an account," the district court held that the statute authorized PCA to obtain Pintos's credit report. But the district court did not address whether the transaction was "a credit transaction involving" Pintos. That may have been because *Hasbun* did not separately discuss that requirement, but our court has discussed it in other cases and it is clearly set out in the statute.

One decision in which we discussed that requirement was *Andrews v. TRW, Inc.*, 225 F.3d 1063, 1067 (9th Cir. 2000), *rev'd on other grounds,*

TRW, Inc. v. Andrews, 534 U.S. 19 (2001), in which we addressed whether the plaintiff, a victim of identity theft, was "involved" in credit transactions initiated by an imposter posing as the plaintiff. The imposter had obtained the plaintiff's social security number and birth date and used that information to apply for credit from various companies. *Id.* at 1064-65. The companies in turn requested and obtained the plaintiff's credit report from TRW. *Id.* At 1065. The plaintiff sued TRW, claiming that it furnished her credit report "without reasonable grounds for believing that she was the consumer whom the credit applications involved." *Id.* (internal quotation marks omitted). The district court granted summary judgment in TRW's favor on this claim, ruling that TRW's disclosures "were made for a purpose permissible under § 1681b(a)(3)(A), because the Plaintiff, even against her will, was 'involved' in the credit transaction initiated by the Imposter." *Id.* at 1066.

On appeal, we concluded that the plaintiff was not "involved" in the credit transaction and reversed the summary judgment ruling. We held that the word "involve" in this context had to be read narrowly:

> The district court held that the Plaintiff was involved in the transaction because her [social security] number was used. The statutory phrase is "a credit transaction involving the consumer." 15 U.S.C. § 1681b(a)(3)(A). "Involve" has two dictionary meanings that are relevant: (1) "to draw in as a participant" or (2) "to oblige to become associated." The district court understood the word in the second sense. We are reluctant to conclude

> that Congress meant to harness any consumer to any transaction where any crook chose to use his or her number. The first meaning of the statutory term must be preferred here. In that sense the Plaintiff was not involved.

Id. at 1067. Thus, a person is "involved" in a credit transaction for purposes of § 1681b(a)(3)(A) where she is "draw[n] in as a participant" in the transaction, but not where she is "oblige[d] to become associated" with the transaction. *See id.*

[3] Here, Pintos did not participate in seeking credit from the towing company. She owned the car that was towed, so she was not as completely distant from the transaction as the victim of identity theft in *Andrews*, but neither was she a participant in the typical transaction where an extension of credit is requested. She had no contact with P&S or PCA until P&S towed her car. She never asked to have the vehicle towed; P&S simply towed the car by direction of the police then tried to collect the charges. Pintos did not initiate the transaction that resulted in PCA requesting her credit report. As the Seventh Circuit held in *Stergiopoulos v. First Midwest Bancorp, Inc.*, 427 F.3d 1043, 1047 (7th Cir. 2005), § 1681b(a)(3)(A) can be relied upon by the party requesting a credit report "only if the consumer initiates the transaction."

[4] The requirement that the consumer initiate the transaction is not satisfied simply because the consumer did something that arguably led to the creditor's claim. In *Mone v. Dranow*, 945 F.2d 306 (9th Cir. 1991), a credit report on Mone was obtained by his former employer, who sued Mone for unfair competition after he quit and established a competing

firm. The report was obtained for the purpose of determining whether Mone had sufficient assets to pay a judgment. *Id.* at 308. Arguably, it was Mone's alleged unfair competition that initiated the chain of events, but we held that the request for the report did not qualify as being "in connection with a credit transaction involving the consumer," under § 1681b(a)(3)(A). *Id.*

[5] Similarly, that Pintos owned the car that was towed did not mean that she initiated the credit transaction. Like the victim in *Andrews*, Pintos was not a "participant" in the credit transaction, but was "oblige[d] to become associated" with it after her car was towed and the towing deficiency claim arose. *See Andrews*, 225 F.3d at 1067.

[6] Our decision in *Hasbun* did not supersede our prior decisions. The holding of that case is properly understood to be that a *judgment* creditor is authorized under the statute to obtain a credit report in connection with collection efforts. *Hasbun*, 323 F.3d 801.

In *Hasbun* a child support enforcement agency obtained a credit report of a father who had fallen behind in paying *court-ordered* child support. We made reference to the "court-ordered" nature of the debt on every page of that decision. We also did so in stating the question posed by the case ("when and how a child support enforcement agency may lawfully obtain the consumer credit report of an individual who has fallen behind in paying *court-ordered* child support") and in summarizing our holding ("We affirm the district court's grant of summary judgment in favor of defendants and hold that child support enforcement agencies need not comply with the

certification requirements of 15 U.S.C. § 1681b(a)(4) when seeking to collect *court-ordered* child support."). *Id.* at 801 (emphasis added). We explicitly adopted and quoted extensively from a Federal Trade Commission commentary which made repeated reference to the permissible purpose of a "judgment creditor" to obtain a credit report. *Id.* at 803 ("[a] *judgment* creditor has a permissible purpose to receive a consumer report on the *judgment* debtor for use in connection with collection of the *judgment* debt") (emphasis added). To be sure, our opinion did not include that qualifier in every statement, but our holding involved a debt that had already been adjudicated. If a debt has been judicially established, there is a "credit transaction involving the consumer" no matter how it arose. The obligation is established as a matter of law, and the statute is satisfied. *Hasbun* extended no further. Application of *Hasbun* to permit a credit report to be obtained to assist the collection of a claim that had not yet been adjudicated is not supported by the logic of that decision nor by our other precedents.

[7] PCA was not a judgment creditor. Its claim against Pintos did not result from a transaction initiated by Pintos. We conclude, therefore, that § 1681b(a)(3)(A) did not authorize PCA to obtain the credit report on Pintos. Accordingly, we reverse the grant of summary judgment in defendants' favor.[2]

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[2] In this appeal of a summary judgment, PCA and Experian argued only that § 1681b(a)(3)(A) authorized PCA to obtain Pintos's credit report. Thus, we need not determine whether PCA had a permissible purpose under any other § 1681b subsection. On remand, Defendants may argue that PCA was

B. 15 U.S.C. § 1681e

We next consider whether Experian is also liable for any violation of the FCRA committed by PCA. The district court did not reach this issue, as it determined that PCA had a permissible purpose to

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authorized to obtain Pintos's report under a different subsection.

In the briefs on the merits, oral argument, petitions for rehearing, and response to petitions for rehearing, there was no argument based on 15 U.S.C. §§ 1681a(m) and 1681b(c). The parties did not appear to view those provisions to be relevant to this case. During our court's consideration of the petitions for rehearing en banc, it was suggested that these provisions, though drafted at a different time and aimed at a different situation, might shed light on the meaning of the relevant statute, § 1681b(a)(3)(A), so we requested supplemental briefs on that subject. The supplemental briefs have not persuaded us to change our opinion.

Those other provisions, §§ 1681a(m) and 1681b(c), were added in 1996 to permit lenders and insurance companies to solicit for business by purchasing lists and limited information about customers who match certain criteria (such as zip code and credit score) from credit reporting agencies. The "prescreened" customers could then be sent, for example, a "preapproved" credit card solicitation. Pintos did not authorize the reporting agency to supply her report and the transaction did not consist of "a firm offer of credit or insurance," under § 1681b(c). Nobody contends otherwise.

At the same time, it should be clear that we do not opine on the meaning or scope of 15 U.S.C. §§ 1681a(m) and 1681b(c) or on the practice of obtaining information from credit reporting agencies to permit the extension of offers to prescreened customers, which the parties to our case agree is authorized by those statutes. A case presenting those questions is not before us.

obtain Pintos's credit report. Experian argues that because 15 U.S.C. § 1681e immunizes it from subscribers' FCRA violations, the statute offers an alternative basis to affirm the summary judgment with respect to its liability.

A credit reporting agency may be liable for its subscriber's violation when the agency fails to comply with the statutory obligations imposed by 15 U.S.C. § 1681e. *See Guimond v. Trans Union Credit Info. Co.*, 45 F.3d 1329, 1333 (9th Cir. 1995). Experian argues that because PCA gave it a "blanket certification" — a written promise to use Experian's credit reports only for permissible purposes — the agency satisfied its statutory obligations under § 1681e. We disagree.

[8] Section 1681e requires more from a credit reporting agency than merely obtaining a subscriber's general promise to obey the law. After prospective subscribers "certify the purposes for which [credit] information is sought, and certify that the information will be used for no other purpose," the reporting agency must make "a reasonable effort" to verify the certifications and may not furnish reports if "reasonable grounds" exist to believe that reports will be used impermissibly. 15 U.S.C. § 1681e(a). Under the plain terms of § 1681e(a), a subscriber's certification cannot absolve the reporting agency of its independent obligation to verify the certification and determine that no reasonable grounds exist for suspecting impermissible use.[3]

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[3] Experian suggests that *Davis v. Asset Servs.*, 46 F. Supp. 2d 503, 508 (M.D. La. 1998), *Boothe v. TRW Credit Data*, 557 F. Supp. 66, 71 (S.D.N.Y. 1982), and *Hiemstra v. TRW, Inc.*, 195 Cal. App. 3d 1629, 1634 (Cal. Ct. App. 1987) support the

Blanket certification cannot eliminate all genuine issues of material fact with regard to Experian's liability.

C. Experian's Motion to File Documents Under Seal

[9] Two standards generally govern motions to seal documents like the one at issue here.[4] First, a "compelling reasons" standard applies to most judicial records. *See Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006) (holding that "[a] party seeking to seal a judicial record . . . bears the burden of . . . meeting the

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contention that blanket certifications will satisfy a credit reporting agency's obligations under § 1681e(a). While these cases hold that credit reporting agencies may rely on blanket certifications rather than having to verify credit requests individually, none provides that a blanket certification by itself is sufficient to satisfy the § 1681e inquiry. *See, e.g., Davis*, 46 F. Supp. 2d at 508 (holding that the defendant complied with the requirements of § 1681e(a) because it obtained a blanket certification *and* because the plaintiff did not submit "any evidence to prove that the [defendant] knew or should have had reason to know that [the subscriber] would access the report for an impermissible purpose"); *Boothe*, 577 F. Supp. at 71 (finding no violation where the primary business of the requesting entity used reports for a permissible purpose and there was "no showing that TRW knew of the improper purpose for the report issued"). Even if Experian did not have to verify PCA's request for Pintos's credit report individually, § 1681e(a) still required proper verification of PCA generally.

[4] A third standard covers the "narrow range of documents" such as "grand jury transcripts" and certain "warrant materials" that "traditionally [have] been kept secret for important policy reasons." *Kamakana*, 447 F.3d at 1178 (citation and internal quotation marks omitted). No party asserts that this third standard is relevant here.

'compelling reasons' standard"); *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135-36 (9th Cir. 2003). This standard derives from the common law right "to inspect and copy public records and documents, including judicial records and documents." *Kamakana*, 447 F.3d at 1178 (citation and internal quotation marks omitted). To limit this common law right of access, a party seeking to seal judicial records must show that "compelling reasons supported by specific factual findings . . . outweigh the general history of access and the public policies favoring disclosure." *Id.* at 1178-79 (internal quotation marks and citations omitted).

Second, a different standard applies to "private materials unearthed during discovery," as such documents are not part of the judicial record. *Id.* at 1180. Rule 26(c) of the Federal Rules of Civil Procedure governs here, providing that a trial court may grant a protective order "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."

The relevant standard for purposes of Rule 26(c) is whether "'good cause' exists to protect th[e] information from being disclosed to the public by balancing the needs for discovery against the need for confidentiality." *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1213 (9th Cir. 2002). This "good cause" standard presents a lower burden for the party wishing to seal documents than the "compelling reasons" standard. The cognizable public interest in judicial records that underlies the "compelling reasons" standard does not exist for documents produced between private litigants. *See Kamakana*, 447 F.3d at 1180 (holding that

"[d]ifferent interests are at stake with the right of access than with Rule 26(c)"); Foltz, 331 F.3d at 1134 ("When discovery material is filed with the court . . . its status changes.").

The "good cause" standard is not limited to discovery. In *Phillips*, we held that "good cause" is also the proper standard when a party seeks access to previously sealed discovery attached to a nondispositive motion. 307 F.3d at 1213 ("when a party attaches a sealed discovery document to a nondispositive motion, the usual presumption of the public's right of access is rebutted"). Nondispositive motions "are often 'unrelated, or only tangentially related, to the underlying cause of action,'" and, as a result, the public's interest in accessing dispositive materials does "not apply with equal force" to nondispositive materials. *Kamakana*, 447 F.3d at 1179. In light of the weaker public interest in nondispositive materials, we apply the "good cause" standard when parties wish to keep them under seal. Applying the "compelling interest" standard under these circumstances would needlessly "undermine a district court's power to fashion effective protective orders." *Foltz*, 331 F.3d at 1135.

[10] Experian wishes to seal documents attached to Pintos's cross-motion for summary judgment. Rule 26(c) does not govern these documents because they are not "private materials unearthed during discovery" but have become part of the judicial record. *Kamakana*, 447 F.3d at 1180. Additionally, the documents do not fall within the *Phillips* exception to the general presumption of access

because Pintos's motion was dispositive.[5] *See Foltz*, 331 F.3d at 1135 (holding that the *Phillips* exception is "expressly limited to the status of materials. . . attached to a *non-dispositive* motion") (emphasis in original). Consequently, Experian must overcome a strong presumption of access by showing that "compelling reasons supported by specific factual findings . . . outweigh the general history of access and the public policies favoring disclosure." *Kamakana*, 447 F.3d at 1178-79 (internal quotation marks and citations omitted).

[11] Under the "compelling reasons" standard, a district court must weigh "relevant factors,"[6] base its decision "on a compelling reason," and "articulate the factual basis for its ruling, without relying on hypothesis or conjecture." *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995). A proper analysis is

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[5] This case differs slightly from *Phillips*, in which a nonparty sought access to court records previously filed under seal. *Phillips*, 307 F.3d at 1209. Here no third party seeks access to previously sealed documents, but this is a distinction without a difference. It is undisputed that a "strong presumption of access to judicial records applies fully to dispositive pleadings." *Kamakana*, 447 F.3d at 1179. Accordingly, whether a third party has sought access is immaterial when a party moves to seal documents already filed with the court. *See id.* at 1179 (holding simply that " 'compelling reasons' must be shown to seal judicial records attached to a dispositive motion").

[6] "Relevant factors" include the "public interest in understanding the judicial process and whether disclosure of the material could result in improper use of the material for scandalous or libelous purposes or infringement upon trade secrets." *Hagestad*, 49 F.3d at 1434 (quoting *EEOC v. Erection Co., Inc.*, 900 F.2d 168, 170 (9th Cir. 1990)).

reviewed for abuse of discretion. *Foltz*, 331 F.3d at 1135. An order that fails to articulate its reasoning must be vacated and remanded because "meaningful appellate review is impossible" when the appellate panel has no way of knowing "whether relevant factors were considered and given appropriate weight." *Hagestad*, 49 F.3d at 1434-35 (internal quotation marks omitted).

[12] The district court's November 9, 2004, denial of Experian's motion to seal offered no explanation for the decision. The explanation provided in the court's April 29, 2005, order denying Experian's motion to alter or amend judgment did not fill the gap. With the case already on appeal, the district court denied Experian's motion on jurisdictional grounds but suggested that it would grant Experian's motion if it still had jurisdiction, staying its prior order to file the documents in the public record pending our resolution of the appeal. According to the district court, *Phillips* would govern the motion and good cause existed for placing Experian's documents under seal.

[13] Because the documents at issue here were attached to a dispositive motion, however, *Phillips* does not provide the proper standard. A determination by the district court that good cause exists for sealing Experian's documents does not establish that there are "compelling reasons" to do so. *See Kamakana*, 447 F.3d at 1180 (holding that "a 'good cause' showing . . . will not suffice to fulfill the 'compelling reasons' standard that a party must meet to rebut the presumption of access to dispositive pleadings and attachments"). Instead, the court must decide whether compelling reasons exist to seal

the documents. *Foltz*, 331 F.3d at 1135-36. We vacate and remand "for the making of findings in support of an[ ] order on this issue," *Hagestad*, 49 F.3d at 1435, in light of the proper legal standard.

III. Conclusion

We reverse the district court's summary judgment in favor of defendants and remand for further proceedings. Additionally, we vacate the district court's order denying Experian's motion to seal documents and remand for consideration in light of the proper legal standard.

REVERSED AND REMANDED; JUDGMENT VACATED.

BEA, Circuit Judge, dissenting:

The majority concludes that because this case involves neither a transaction for which Pintos sought a loan nor the collection of a judgment debt, 15 U.S.C. § 1681b(a)(3)(A) did not authorize the Pacific Creditors Association ("PCA") to obtain Maria Pintos's credit report or Experian Information Solutions, Inc. ("Experian") to release it. Because I disagree with the majority's conclusion that Pintos's decision to leave her unregistered car on a public street where she knew it might be towed did not "involve" her in a credit transaction, I respectfully dissent.

Title 15, Section 1681b(a)(3)(A) of the United States Code permits a credit reporting agency to furnish a consumer's credit report to a person it has reason to believe "intends to use the information in connection with a *credit transaction involving* the consumer . . . and involving the extension of credit to,

or review or collection of an account of, the consumer." Relying on *Andrews v. TRW, Inc.*, 225 F.3d 1063, 1067 (9th Cir. 2000), the majority concludes that because Pintos did not ask for her car to be towed, *ante* at 7286, she was not "involved" in the transaction.

This case bears little resemblance to *Andrews*. In *Andrews*, the plaintiff was a victim of identity theft—she was passive and guiltless, not even negligent. Pintos, by contrast, was no innocent bystander in the chain of events that resulted in her debt to P&S Towing ("P&S"). Pintos chose—for two consecutive years—not to pay the automobile registration fees required by California law. Pintos chose instead to break the law by driving her car on expired tags. *See* Cal. Veh. Code § 4000(a)(1) ("No person shall drive, move, or leave standing upon a highway . . . any motor vehicle . . . unless it is registered and the appropriate fees have been paid. . . ."); *see also id.* § 42001.8 (making it an infraction to violate § 4000). Pintos chose to leave her car on a public street, subjecting it to towing. *See id.* § 22651(o)(1)(A) (permitting law enforcement to tow a car whose registration is six months overdue). And Pintos chose not to pay the fees assessed by P&S or retrieve her car in a timely manner, resulting in the lien sale and deficiency claim. *See* Cal. Civil Code §§ 3068.1, 3068.2 (providing that a towing company has a lien dependent upon possession and a deficiency claim for unpaid towing charges). With all respect both to Pintos and the majority, refusing to pay required vehicle registration fees and parking one's car on a public street *is* asking to have one's car towed.

The majority rightly observes that the fact Pintos's actions resulted in P&S's claim is, alone, insufficient to justify P&S requesting her credit report. In *Mone v. Dranow*, 945 F.2d 306 (9th Cir. 1991), Dranow, Mone's former employer, concluded Mone was engaged in unfair competition by running a rival business, and obtained Mone's credit report in order to determine whether suing Mone might be worthwhile. We held that Dranow did not intend to use the credit report "in connection with a credit transaction involving" Mone. *Id.* at 308 (quoting 15 U.S.C. § 1681b(3)(A) (1982)).

But P&S's relationship to Pintos is more than that of mere prospective litigation adversary; P&S is a creditor entitled to access Pintos's credit report in order to collect the debt. *See Hasbun v. County of Los Angeles*, 323 F.3d 801, 803 (9th Cir. 2003) ("[T]he limited case law addressing this issue has uniformly held that creditors have a permissible purpose in receiving a consumer report to assist them in collecting a debt.").

The moment P&S towed Pintos's car, P&S became Pintos's creditor; Pintos owed P&S a definite, legally recognized debt for the services P&S rendered—loaned—to Pintos until Pintos paid for those services. Under the California Civil Code, when P&S towed Pintos's car at the direction of the San Bruno Police Department, P&S obtained "a lien dependent upon possession for the compensation to which [P&S] is legally entitled for towing, storage, or labor associated with the recovery or load salvage" of Pintos's vehicle. *See* Cal. Civil. Code § 3068.1. This code section entitled P&S to sell Pintos's car to recover its fees without seeking judicial approval or

intervention; the code certainly does not require P&S to obtain a judgment. And any tow-truck operator who has such a lien "has a deficiency claim against the registered owner of the vehicle." *Id.* § 3068.2 (emphasis added). A deficiency claim is a debt. That Pintos's debt was created by operation of law rather than contract is of no moment.

The majority concludes *Hasbun* is inapplicable because that case involved a judgment debt. See 323 F.3d at 803-04. But *Hasbun* is not so limited.[1] *Hasbun* concerned child support payments and the *only* way a person becomes obligated to make such payments is through a judicial decree. It does not follow that judicial adjudication is the only way an individual may become obligated as a debtor. The cited California Civil Code sections *automatically* make the owner of a towed vehicle liable for towing charges and *automatically* create a lien and a deficiency claim in favor of the towing company. The towing company has no need to reduce its lien to a court judgment to establish Pintos's obligation to pay. There is a creditor-debtor relationship established by the operation of the lien law regardless whether an

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[1] Indeed, *Hasbun* concluded that judgment creditors have a permissible purpose in obtaining a credit report because such a creditor " 'is in the same position as any creditor attempting to collect a debt from a consumer.' " *Id.* at 803 (emphasis added) (quoting 16 C.F.R. § 600, App. at 509 (2002)). The principle that a creditor may access a debtor's credit report in order to collect upon a delinquent account is recognized by both the Federal Trade Commission, 16 C.F.R. Pt. 600, App. at 59, and by the Sixth Circuit, *see Duncan v. Handmaker*, 149 F.3d 424, 427-28 (6th Cir. 1998).

action to collect the deficiency is commenced. P&S Towing is thus much more like the judgment creditor in *Hasbun* than the prospective litigation claimant in *Mone*.

For these reasons, I would affirm the decision of the district court. I concur, however, in part C of the majority opinion.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MARIA E. PINTOS, *Plaintiff-Appellant,* v. PACIFIC CREDITORS ASSOCIATION; EXPERIAN INFORMATION SOLUTIONS, INC., *Defendants-Appellees.*	No. 04-17485 D.C. No. CV-03-05471-CW
MARIA E. PINTOS, *Plaintiff-Appellee,* v. PACIFIC CREDITORS ASSOCIATION, *Defendant,* and EXPERIAN INFORMATION SOLUTION, INC., *Defendant-Appellant.*	No. 04-17558 D.C. No. CV-03-05471-CW ORDER AND OPINION

Appeal from the United States District Court
for the Northern District of California
Claudia Wilken, District Judge, Presiding

Argued and Submitted
January 9, 2007—San Francisco, California

Filed April 30, 2009
Before: Mary M. Schroeder, Richard R. Clifton, and
Carlos T. Bea, Circuit Judges.*

Opinion by Judge Clifton;
Dissent by Judge Bea

COUNSEL

Andrew J. Ogilvie (argued), Kemnitzer, Anderson, Barron, Ogilvie & Brewer, LLP, San Francisco, California, for appellant/cross-appellee Maria E. Pintos.

Daniel J. McLoon (argued), Jones Day, Los Angeles, California, Adam R. Sand and Marc S. Carlson, Jones Day, San Francisco, California, for appellee/cross-appellant Experian Information Solutions, Inc.

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* George P. Schiavelli, who was previously a member of this panel sitting by designation while serving as a United States District Judge for the Central District of California, resigned on October 5, 2008. Judge Bea was drawn by lot to replace him, pursuant to our General Order 3.2(g).

Andrew M. Steinheimer (argued) and Mark E. Ellis, Ellis Coleman Poirier LaVoie & Steinheimer, LLP, Sacramento, California, for appellee Pacific Creditors Association.

ORDER

The opinion in the above-captioned matter filed on September 21, 2007, and published at 504 F.3d 792, is WITHDRAWN. The superseding opinion shall be filed concurrently with this order. The pending petition for panel rehearing and rehearing en banc is dismissed as moot. The parties may file new petitions as to the opinion for rehearing and rehearing en banc in accordance with the Federal Rules of Appellate Procedure.

OPINION

CLIFTON, Circuit Judge:

Maria E. Pintos appeals the district court's summary adjudication of her claims under the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 et seq. Pintos contends that Pacific Creditors Association ("PCA") violated the FCRA by obtaining, without any FCRA-sanctioned purpose, a credit report on her from Experian Information Solutions, Inc., a credit reporting agency. Pintos also argues that Experian violated the FCRA by furnishing the report to PCA.

The district court granted summary judgment in favor of the defendants, concluding that PCA was authorized to obtain Pintos's credit report under the FCRA, which allows for the furnishing of reports "in connection with a credit transaction involving the

consumer . . . and involving the . . . collection of an account of[ ] the consumer." 15 U.S.C. § 1681b(a)(3)(A). The district court determined that the transaction involved the collection of an account, relying upon our decision in *Hasbun v. County of Los Angeles*, 323 F.3d 801 (9th Cir. 2003). We conclude that *Hasbun* is more limited, however. Because the current case involves neither a transaction for which Pintos sought credit nor the collection of a judgment debt, we conclude that § 1681b(a)(3)(A) did not authorize PCA to obtain the credit report on Pintos. Thus, we vacate the judgment of the district court and remand for further proceedings regarding the defendants' liability. We also vacate the district court's order regarding Experian's motion to seal certain documents and remand for consideration under the proper legal standard.

I. Background

Police officers found a sport utility vehicle belonging to Pintos parked on the street in San Bruno, California, on May 29, 2002. The vehicle's registration was expired. At police direction, the vehicle was towed, and the towing company, P&S Towing, obtained a lien on the vehicle for towing and impound costs. P&S later sold the vehicle when Pintos failed to reclaim it or pay the outstanding charges. Since the vehicle's sale price did not cover the amount owed, P&S asserted a deficiency claim against Pintos and later transferred that claim to PCA, a collection agency.[1]

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[1] California Civil Code § 3068.1(a) provides for liens "dependent upon possession for the compensation to which [a] person is legally entitled for towing, storage, or labor associated

PCA sought and obtained a credit report on Pintos from Experian on December 5, 2002, in connection with its effort to collect on the debt assigned by P&S. Pintos subsequently filed a complaint against PCA and Experian under the FCRA. She alleged that PCA violated the FCRA by obtaining her credit report without any FCRA-sanctioned purpose and that Experian was liable for providing the report to PCA.

PCA and Experian filed separate motions for summary judgment. Both argued that, under 15 U.S.C. § 1681b(a)(3)(A), PCA had a permissible purpose for obtaining Pintos's credit report because it was seeking to collect a debt, the towing deficiency claim. Experian further argued that it was not liable for a violation because it had fulfilled its obligations under 15 U.S.C. § 1681e, which immunizes a reporting agency against FCRA violations by the agency's subscribers so long as the agency takes certain steps.

Pintos filed a cross-motion for partial summary judgment on the issues of permissible purpose and Experian's alleged negligence. She attached to that

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with recovery or load salvage of any vehicle subject to registration that has been authorized to be removed by a public agency." The statute also allows for lien sales with varying procedures dependant on the value of the vehicle towed and stored. *See id.* §§ 3068.1(b)-3068.1(c). In addition, a tow truck operator with a lien pursuant to § 3068.1 "has a deficiency claim against the registered owner of the vehicle if the vehicle is not leased or leased with a driver for an amount equal to the towing and storage charges, not to exceed 120 days of storage . . . less the amount received from the sale of the vehicle." *Id.* § 3068.2(a).

motion several Experian documents detailing the company's internal procedures for complying with its FCRA obligations. Claiming these documents were confidential and proprietary, Experian filed a motion to seal them.

The district court granted the defendants' motions for summary judgment on November 9, 2004. Citing *Hasbun*, the court agreed that § 1681b(a)(3)(A) permitted PCA to obtain Pintos's credit report. The court denied Experian's motion to seal documents, without explanation.

Pintos filed a timely notice of appeal on December 8, 2004. Experian cross-appealed the district court's denial of its motion to seal on December 9, 2004. It also sought reconsideration by the district court of the denial of that motion. On April 29, 2005, the district court held that it lacked jurisdiction over the matter since Experian already appealed the order to this court. Nevertheless, the court stated that, if it had jurisdiction, it would grant Experian's motion under *Phillips ex rel. Estates of Byrd v. General Motors Corp.*, 307 F.3d 1206 (9th Cir. 2002), and it stayed its prior order on the subject pending the appeal.

II. Discussion

We review grants of summary judgment de novo. *ACLU v. City of Las Vegas*, 466 F.3d 784, 790 (9th Cir. 2006). Cross-motions for summary judgment are evaluated separately under this same standard. *Id.* at 790-91; *Hoopa Valley Indian Tribe v. Ryan*, 415 F.3d 986, 989-90 (9th Cir. 2005).

A. 15 U.S.C. § 1681b(a)(3)(A)

[1] "Congress enacted the FCRA in 1970 to promote efficiency in the Nation's banking system and to protect consumer privacy." *TRW Inc. v. Andrews*, 534 U.S. 19, 23 (2001). Those two goals lie in tension, and the FCRA strikes a balance between them. The Act authorizes credit reporting agencies to "furnish . . . consumer report[s]" because "[c]onsumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers." 15 U.S.C. §§ 1681(a)(3), 1681b(a). At the same time, the FCRA "requir[es] credit reporting agencies to maintain reasonable procedures designed to assure maximum possible accuracy of the information contained in credit reports." *Andrews*, 534 U.S. at 23 (citations and internal quotation marks omitted). Importantly for this case, the FCRA permits agencies to furnish credit reports only for "certain statutorily enumerated purposes." *Id.*

The statutory limitation on the furnishing of credit reports is particularly relevant here, as the parties dispute whether PCA had a permissible purpose in obtaining Pintos's credit report. Defendants contend that it did, under 15 U.S.C. § 1681b(a)(3)(A):

> (a) In general
>
> Subject to subsection (c) of this section, any consumer reporting agency may furnish a consumer report under the following circumstances and no other:
>
> ***
>
> (3) To a person which it has reason to believe—
>
> (A) intends to use the information in connection with a credit transaction involving the consumer on whom the

> information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer;

[2] To qualify under § 1681b(a), the "credit transaction" must both (1) be "a credit transaction involving the consumer on whom the information is to be furnished" and (2) involve "the extension of credit to, or review or collection of an account of, the consumer." Concluding that the transaction here involved the "collection of an account," the district court held that the statute authorized PCA to obtain Pintos's credit report. But the district court did not address whether the transaction was "a credit transaction involving" Pintos. That may have been because *Hasbun* did not separately discuss that requirement, but our court has discussed it in other cases and it is clearly set out in the statute.

One decision in which we discussed that requirement was *Andrews v. TRW, Inc.*, 225 F.3d 1063, 1067 (9th Cir. 2000), *rev'd on other grounds, TRW, Inc. v. Andrews*, 534 U.S. 19 (2001), in which we addressed whether the plaintiff, a victim of identity theft, was "involved" in credit transactions initiated by an imposter posing as the plaintiff. The imposter had obtained the plaintiff's social security number and birth date and used that information to apply for credit from various companies. *Id.* at 1064-65. The companies in turn requested and obtained the plaintiff's credit report from TRW. *Id.* At 1065. The plaintiff sued TRW, claiming that it furnished her credit report "without reasonable grounds for believing that she was the consumer whom the credit applications involved." *Id.* (internal quotation marks

omitted). The district court granted summary judgment in TRW's favor on this claim, ruling that TRW's disclosures "were made for a purpose permissible under § 1681b(a)(3)(A), because the Plaintiff, even against her will, was 'involved' in the credit transaction initiated by the Imposter." *Id.* at 1066.

On appeal, we concluded that the plaintiff was not "involved" in the credit transaction and reversed the summary judgment ruling. We held that the word "involve" in this context had to be read narrowly:

> The district court held that the Plaintiff was involved in the transaction because her [social security] number was used. The statutory phrase is "a credit transaction involving the consumer." 15 U.S.C. § 1681b(a)(3)(A). "Involve" has two dictionary meanings that are relevant: (1) "to draw in as a participant" or (2) "to oblige to become associated." The district court understood the word in the second sense. We are reluctant to conclude that Congress meant to harness any consumer to any transaction where any crook chose to use his or her number. The first meaning of the statutory term must be preferred here. In that sense the Plaintiff was not involved.

Id. at 1067. Thus, a person is "involved" in a credit transaction for purposes of § 1681b(a)(3)(A) where she is "draw[n] in as a participant" in the transaction, but not where she is "oblige[d] to become associated" with the transaction. *See id.*

[3] Here, Pintos did not participate in seeking credit from the towing company. She owned the car that was towed, so she was not as completely distant

from the transaction as the victim of identity theft in *Andrews*, but neither was she a participant in the typical transaction where an extension of credit is requested. She had no contact with P&S or PCA until P&S towed her car. She never asked to have the vehicle towed; P&S simply towed the car by direction of the police then tried to collect the charges. Pintos did not initiate the transaction that resulted in PCA requesting her credit report. As the Seventh Circuit held in *Stergiopoulos v. First Midwest Bancorp, Inc.*, 427 F.3d 1043, 1047 (7th Cir. 2005), § 1681b(a)(3)(A) can be relied upon by the party requesting a credit report "only if the consumer initiates the transaction."

[4] The requirement that the consumer initiate the transaction is not satisfied simply because the consumer did something that arguably led to the creditor's claim. In *Mone v. Dranow*, 945 F.2d 306 (9th Cir. 1991), a credit report on Mone was obtained by his former employer, who sued Mone for unfair competition after he quit and established a competing firm. The report was obtained for the purpose of determining whether Mone had sufficient assets to pay a judgment. *Id.* at 308. Arguably, it was Mone's alleged unfair competition that initiated the chain of events, but we held that the request for the report did not qualify as being "in connection with a credit transaction involving the consumer," under § 1681b(a)(3)(A). *Id.*

[5] Similarly, that Pintos owned the car that was towed did not mean that she initiated the credit transaction. Like the victim in *Andrews*, Pintos was not a "participant" in the credit transaction, but was "oblige[d] to become associated" with it after her car

was towed and the towing deficiency claim arose. *See Andrews*, 225 F.3d at 1067.

[6] Our decision in *Hasbun* did not supersede our prior decisions. The holding of that case is properly understood to be that a *judgment* creditor is authorized under the statute to obtain a credit report in connection with collection efforts. *Hasbun*, 323 F.3d 801.

In *Hasbun* a child support enforcement agency obtained a credit report of a father who had fallen behind in paying *court-ordered* child support. We made reference to the "court-ordered" nature of the debt on every page of that decision. We also did so in stating the question posed by the case ("when and how a child support enforcement agency may lawfully obtain the consumer credit report of an individual who has fallen behind in paying *court-ordered* child support") and in summarizing our holding ("We affirm the district court's grant of summary judgment in favor of defendants and hold that child support enforcement agencies need not comply with the certification requirements of 15 U.S.C. § 1681b(a)(4) when seeking to collect *court-ordered* child support."). *Id.* at 801 (emphasis added). We explicitly adopted and quoted extensively from a Federal Trade Commission commentary which made repeated reference to the permissible purpose of a "judgment creditor" to obtain a credit report. *Id.* at 803 ("[a] *judgment* creditor has a permissible purpose to receive a consumer report on the *judgment* debtor for use in connection with collection of the *judgment* debt") (emphasis added). To be sure, our opinion did not include that qualifier in every statement, but our holding involved a debt that had already been

adjudicated. If a debt has been judicially established, there is a "credit transaction involving the consumer" no matter how it arose. The obligation is established as a matter of law, and the statute is satisfied. *Hasbun* extended no further. Application of *Hasbun* to permit a credit report to be obtained to assist the collection of a claim that had not yet been adjudicated is not supported by the logic of that decision nor by our other precedents.

[7] PCA was not a judgment creditor. Its claim against Pintos did not result from a transaction initiated by Pintos. We conclude, therefore, that § 1681b(a)(3)(A) did not authorize PCA to obtain the credit report on Pintos. Accordingly, we reverse the grant of summary judgment in defendants' favor.[2]

B. 15 U.S.C. § 1681e

We next consider whether Experian is also liable for any violation of the FCRA committed by PCA. The district court did not reach this issue, as it determined that PCA had a permissible purpose to obtain Pintos's credit report. Experian argues that because 15 U.S.C. § 1681e immunizes it from subscribers' FCRA violations, the statute offers an alternative basis to affirm the summary judgment with respect to its liability.

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[2] In this appeal of a summary judgment, PCA and Experian argued only that § 1681b(a)(3)(A) authorized PCA to obtain Pintos's credit report. Thus, we need not determine whether PCA had a permissible purpose under any other § 1681b subsection. On remand, Defendants may argue that PCA was authorized to obtain Pintos's report under a different subsection.

A credit reporting agency may be liable for its subscriber's violation when the agency fails to comply with the statutory obligations imposed by 15 U.S.C. § 1681e. *See Guimond v. Trans Union Credit Info. Co.*, 45 F.3d 1329, 1333 (9th Cir. 1995). Experian argues that because PCA gave it a "blanket certification" — a written promise to use Experian's credit reports only for permissible purposes — the agency satisfied its statutory obligations under § 1681e. We disagree.

[8] Section 1681e requires more from a credit reporting agency than merely obtaining a subscriber's general promise to obey the law. After prospective subscribers "certify the purposes for which [credit] information is sought, and certify that the information will be used for no other purpose," the reporting agency must make "a reasonable effort" to verify the certifications and may not furnish reports if "reasonable grounds" exist to believe that reports will be used impermissibly. 15 U.S.C. § 1681e(a). Under the plain terms of § 1681e(a), a subscriber's certification cannot absolve the reporting agency of its independent obligation to verify the certification and determine that no reasonable grounds exist for suspecting impermissible use.[3]

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[3] Experian suggests that *Davis v. Asset Servs.*, 46 F. Supp. 2d 503, 508 (M.D. La. 1998), *Boothe v. TRW Credit Data*, 557 F. Supp. 66, 71 (S.D.N.Y. 1982), and *Hiemstra v. TRW, Inc.*, 195 Cal. App. 3d 1629, 1634 (Cal. Ct. App. 1987) support the contention that blanket certifications will satisfy a credit reporting agency's obligations under § 1681e(a). While these cases hold that credit reporting agencies may rely on blanket certifications rather than having to verify credit requests individually, none provides that a blanket certification by itself is sufficient to satisfy the § 1681e inquiry. *See, e.g.*, *Davis*, 46 F.

Blanket certification cannot eliminate all genuine issues of material fact with regard to Experian's liability.

C. Experian's Motion to File Documents Under Seal

[9] Two standards generally govern motions to seal documents like the one at issue here.[4] First, a "compelling reasons" standard applies to most judicial records. See *Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006) (holding that "[a] party seeking to seal a judicial record . . . bears the burden of . . . meeting the 'compelling reasons' standard"); *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135-36 (9th Cir. 2003). This standard derives from the common law right "to inspect and copy public records and

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Supp. 2d at 508 (holding that the defendant complied with the requirements of § 1681e(a) because it obtained a blanket certification *and* because the plaintiff did not submit "any evidence to prove that the [defendant] knew or should have had reason to know that [the subscriber] would access the report for an impermissible purpose"); *Boothe*, 577 F. Supp. at 71 (finding no violation where the primary business of the requesting entity used reports for a permissible purpose and there was "no showing that TRW knew of the improper purpose for the report issued"). Even if Experian did not have to verify PCA's request for Pintos's credit report individually, § 1681e(a) still required proper verification of PCA generally.

[4] A third standard covers the "narrow range of documents" such as "grand jury transcripts" and certain "warrant materials" that "traditionally [have] been kept secret for important policy reasons." *Kamakana*, 447 F.3d at 1178 (citation and internal quotation marks omitted). No party asserts that this third standard is relevant here.

documents, including judicial records and documents." *Kamakana*, 447 F.3d at 1178 (citation and internal quotation marks omitted). To limit this common law right of access, a party seeking to seal judicial records must show that "compelling reasons supported by specific factual findings . . . outweigh the general history of access and the public policies favoring disclosure." *Id.* at 1178-79 (internal quotation marks and citations omitted).

Second, a different standard applies to "private materials unearthed during discovery," as such documents are not part of the judicial record. *Id.* at 1180. Rule 26(c) of the Federal Rules of Civil Procedure governs here, providing that a trial court may grant a protective order "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."

The relevant standard for purposes of Rule 26(c) is whether "'good cause' exists to protect th[e] information from being disclosed to the public by balancing the needs for discovery against the need for confidentiality." *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1213 (9th Cir. 2002). This "good cause" standard presents a lower burden for the party wishing to seal documents than the "compelling reasons" standard. The cognizable public interest in judicial records that underlies the "compelling reasons" standard does not exist for documents produced between private litigants. *See Kamakana*, 447 F.3d at 1180 (holding that "[d]ifferent interests are at stake with the right of access than with Rule 26(c)"); *Foltz*, 331 F.3d at 1134 ("When discovery material is filed with the court . . . its status changes.").

The "good cause" standard is not limited to discovery. In *Phillips*, we held that "good cause" is also the proper standard when a party seeks access to previously sealed discovery attached to a nondispositive motion. 307 F.3d at 1213 ("when a party attaches a sealed discovery document to a nondispositive motion, the usual presumption of the public's right of access is rebutted"). Nondispositive motions "are often 'unrelated, or only tangentially related, to the underlying cause of action,'" and, as a result, the public's interest in accessing dispositive materials does "not apply with equal force" to nondispositive materials. *Kamakana*, 447 F.3d at 1179. In light of the weaker public interest in nondispositive materials, we apply the "good cause" standard when parties wish to keep them under seal. Applying the "compelling interest" standard under these circumstances would needlessly "undermine a district court's power to fashion effective protective orders." *Foltz*, 331 F.3d at 1135.

[10] Experian wishes to seal documents attached to Pintos's cross-motion for summary judgment. Rule 26(c) does not govern these documents because they are not "private materials unearthed during discovery" but have become part of the judicial record. *Kamakana*, 447 F.3d at 1180. Additionally, the documents do not fall within the *Phillips* exception to the general presumption of access because Pintos's motion was dispositive.[5] *See Foltz*,

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[5] This case differs slightly from *Phillips*, in which a nonparty sought access to court records previously filed under seal. *Phillips*, 307 F.3d at 1209. Here no third party seeks access to previously sealed documents, but this is a distinction without a

331 F.3d at 1135 (holding that the *Phillips* exception is "expressly limited to the status of materials. . . attached to a *non-dispositive* motion") (emphasis in original). Consequently, Experian must overcome a strong presumption of access by showing that "compelling reasons supported by specific factual findings . . . outweigh the general history of access and the public policies favoring disclosure." *Kamakana*, 447 F.3d at 1178-79 (internal quotation marks and citations omitted).

[11] Under the "compelling reasons" standard, a district court must weigh "relevant factors,"[6] base its decision "on a compelling reason," and "articulate the factual basis for its ruling, without relying on hypothesis or conjecture." *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995). A proper analysis is reviewed for abuse of discretion. *Foltz*, 331 F.3d at 1135. An order that fails to articulate its reasoning must be vacated and remanded because "meaningful appellate review is impossible" when the appellate

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difference. It is undisputed that a "strong presumption of access to judicial records applies fully to dispositive pleadings." *Kamakana*, 447 F.3d at 1179. Accordingly, whether a third party has sought access is immaterial when a party moves to seal documents already filed with the court. *See id.* at 1179 (holding simply that " 'compelling reasons' must be shown to seal judicial records attached to a dispositive motion").

[6] "Relevant factors" include the "public interest in understanding the judicial process and whether disclosure of the material could result in improper use of the material for scandalous or libelous purposes or infringement upon trade secrets." *Hagestad*, 49 F.3d at 1434 (quoting *EEOC v. Erection Co., Inc.*, 900 F.2d 168, 170 (9th Cir. 1990)).

panel has no way of knowing "whether relevant factors were considered and given appropriate weight." *Hagestad*, 49 F.3d at 1434-35 (internal quotation marks omitted).

[12] The district court's November 9, 2004, denial of Experian's motion to seal offered no explanation for the decision. The explanation provided in the court's April 29, 2005, order denying Experian's motion to alter or amend judgment did not fill the gap. With the case already on appeal, the district court denied Experian's motion on jurisdictional grounds but suggested that it would grant Experian's motion if it still had jurisdiction, staying its prior order to file the documents in the public record pending our resolution of the appeal. According to the district court, *Phillips* would govern the motion and good cause existed for placing Experian's documents under seal.

[13] Because the documents at issue here were attached to a dispositive motion, however, *Phillips* does not provide the proper standard. A determination by the district court that good cause exists for sealing Experian's documents does not establish that there are "compelling reasons" to do so. *See Kamakana*, 447 F.3d at 1180 (holding that "a 'good cause' showing . . . will not suffice to fulfill the 'compelling reasons' standard that a party must meet to rebut the presumption of access to dispositive pleadings and attachments"). Instead, the court must decide whether compelling reasons exist to seal the documents. *Foltz*, 331 F.3d at 1135-36. We vacate and remand "for the making of findings in support of an[ ] order on this issue," *Hagestad*, 49 F.3d at 1435, in light of the proper legal standard.

III. Conclusion

We reverse the district court's summary judgment in favor of defendants and remand for further proceedings. Additionally, we vacate the district court's order denying Experian's motion to seal documents and remand for consideration in light of the proper legal standard.

REVERSED AND REMANDED; JUDGMENT VACATED.

BEA, Circuit Judge, dissenting:

The majority concludes that because this case involves neither a transaction for which Pintos sought a loan nor the collection of a judgment debt, 15 U.S.C. § 1681b(a)(3)(A) did not authorize the Pacific Creditors Association ("PCA") to obtain Maria Pintos's credit report or Experian Information Solutions, Inc. ("Experian") to release it. Because I disagree with the majority's conclusion that Pintos's decision to leave her unregistered car on a public street where she knew it might be towed did not "involve" her in a credit transaction, I respectfully dissent.

Title 15, Section 1681b(a)(3)(A) of the United States Code permits a credit reporting agency to furnish a consumer's credit report to a person it has reason to believe "intends to use the information in connection with a *credit transaction involving* the consumer . . . and involving the extension of credit to, or review or collection of an account of, the consumer." Relying on *Andrews v. TRW, Inc.*, 225 F.3d 1063, 1067 (9th Cir. 2000), the majority concludes that because Pintos did not ask for her car to be towed, *ante* at 5049, she was not "involved" in the transaction.

This case bears little resemblance to *Andrews*. In *Andrews*, the plaintiff was a victim of identity theft—she was passive and guiltless, not even negligent. Pintos, by contrast, was no innocent bystander in the chain of events that resulted in her debt to P&S Towing ("P&S"). Pintos chose—for two consecutive years—not to pay the automobile registration fees required by California law. Pintos chose instead to break the law by driving her car on expired tags. *See* Cal. Veh. Code § 4000(a)(1) ("No person shall drive, move, or leave standing upon a highway . . . any motor vehicle . . . unless it is registered and the appropriate fees have been paid. . . ."); *see also id.* § 42001.8 (making it an infraction to violate § 4000). Pintos chose to leave her car on a public street, subjecting it to towing. *See id.* § 22651(o)(1)(A) (permitting law enforcement to tow a car whose registration is six months overdue). And Pintos chose not to pay the fees assessed by P&S or retrieve her car in a timely manner, resulting in the lien sale and deficiency claim. *See* Cal. Civil Code §§ 3068.1, 3068.2 (providing that a towing company has a lien dependent upon possession and a deficiency claim for unpaid towing charges). With all respect both to Pintos and the majority, refusing to pay required vehicle registration fees and parking one's car on a public street *is* asking to have one's car towed.

The majority rightly observes that the fact Pintos's actions resulted in P&S's claim is, alone, insufficient to justify P&S requesting her credit report. In *Mone v. Dranow*, 945 F.2d 306 (9th Cir. 1991), Dranow, Mone's former employer, concluded Mone was engaged in unfair competition by running a rival business, and obtained Mone's credit report in order to determine whether suing Mone might be

worthwhile. We held that Dranow did not intend to use the credit report "in connection with a credit transaction involving" Mone. *Id.* at 308 (quoting 15 U.S.C. § 1681b(3)(A) (1982)).

But P&S's relationship to Pintos is more than that of mere prospective litigation adversary; P&S is a creditor entitled to access Pintos's credit report in order to collect the debt. *See Hasbun v. County of Los Angeles*, 323 F.3d 801, 803 (9th Cir. 2003) ("[T]he limited case law addressing this issue has uniformly held that creditors have a permissible purpose in receiving a consumer report to assist them in collecting a debt.").

The moment P&S towed Pintos's car, P&S became Pintos's creditor; Pintos owed P&S a definite, legally recognized debt for the services P&S rendered—loaned—to Pintos until Pintos paid for those services. Under the California Civil Code, when P&S towed Pintos's car at the direction of the San Bruno Police Department, P&S obtained "a lien dependent upon possession for the compensation to which [P&S] is legally entitled for towing, storage, or labor associated with the recovery or load salvage" of Pintos's vehicle. *See* Cal. Civil. Code § 3068.1. This code section entitled P&S to sell Pintos's car to recover its fees without seeking judicial approval or intervention; the code certainly does not require P&S to obtain a judgment. And any tow-truck operator who has such a lien "has a deficiency claim against the registered owner of the vehicle." *Id.* § 3068.2 (emphasis added). A deficiency claim is a debt. That Pintos's debt was created by operation of law rather than contract is of no moment.

The majority concludes *Hasbun* is inapplicable because that case involved a judgment debt. See 323 F.3d at 803-04. But *Hasbun* is not so limited.[1] *Hasbun* concerned child support payments and the *only* way a person becomes obligated to make such payments is through a judicial decree. It does not follow that judicial adjudication is the only way an individual may become obligated as a debtor. The cited California Civil Code sections *automatically* make the owner of a towed vehicle liable for towing charges and *automatically* create a lien and a deficiency claim in favor of the towing company. The towing company has no need to reduce its lien to a court judgment to establish Pintos's obligation to pay. There is a creditor-debtor relationship established by the operation of the lien law regardless whether an action to collect the deficiency is commenced. P&S Towing is thus much more like the judgment creditor in *Hasbun* than the prospective litigation claimant in *Mone*.

For these reasons, I would affirm the decision of the district court. I concur, however, in part C of the majority opinion.

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[1] Indeed, *Hasbun* concluded that judgment creditors have a permissible purpose in obtaining a credit report because such a creditor " 'is in the same position as *any* creditor attempting to collect a debt from a consumer.' " *Id.* at 803 (emphasis added) (quoting 16 C.F.R. § 600, App. at 509 (2002)). The principle that a creditor may access a debtor's credit report in order to collect upon a delinquent account is recognized by both the Federal Trade Commission, 16 C.F.R. Pt. 600, App. at 59, and by the Sixth Circuit, *see Duncan v. Handmaker*, 149 F.3d 424, 427-28 (6th Cir. 1998).

APPENDIX C

United States Court of Appeals,
Ninth Circuit.
Maria E. PINTOS, Plaintiff-Appellant,
v.
PACIFIC CREDITORS ASSOCIATION; Experian Information Solutions, Inc., Defendants-Appellees.
Maria E. Pintos, Plaintiff-Appellee,
v.
Pacific Creditors Association, Defendant,
and
Experian Information Solutions, Inc., Defendant-Appellant.
Nos. 04-17485, 04-17558.

Argued and Submitted Jan. 9, 2007.
Filed Sept. 21, 2007.

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Daniel J. McLoon (argued), Jones Day, Los Angeles, CA, Adam R. Sand and Marc S. Carlson, Jones Day, San Francisco, CA, for appellee/cross-appellant Experian Information Solutions, Inc.

Andrew M. Steinheimer (argued) and Mark E. Ellis, Ellis Coleman Poirier LaVoie & Steinheimer, LLP, Sacramento, CA, for appellee Pacific Creditors Association.

Appeal from the United States District Court for the Northern District of California; Claudia Wilken, District Judge, Presiding. D.C. No. CV-03-05471-CW.

Before: MARY M. SCHROEDER, Chief Circuit Judge, RICHARD R. CLIFTON, Circuit Judge, and GEORGE P. SCHIAVELLI,* District Judge.

CLIFTON, Circuit Judge:

Maria E. Pintos appeals the district court's summary adjudication of her claims under the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 et seq. Pintos contends that Pacific Creditors Association violated the FCRA by obtaining, without any FCRA-sanctioned purpose, a credit report on her from Experian Information Solutions, Inc., a credit reporting agency. Pintos also argues that Experian violated the FCRA by furnishing the report to PCA.

The district court granted summary judgment in favor of the defendants. Relying on our decision in *Hasbun v. County of Los Angeles*, 323 F.3d 801 (9th Cir.2003), the court held that PCA was authorized to obtain Pintos's credit report under 15 U.S.C. §

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* The Honorable George P. Schiavelli, United States District Judge for the Central District of California, sitting by designation.

1681b(a)(3)(A) because it was attempting to collect a debt from Pintos. *Hasbun* held that debt collection was a permissible purpose for obtaining a credit report, but we decided that case prior to the enactment of the Fair and Accurate Credit Transactions Act of 2003 ("FACTA"), Pub.L. No. 108-159, 117 Stat. 1952. FACTA makes clear that debt collection is a permissible purpose for obtaining a credit report under § 1681b(a)(3)(A) only in connection with a "credit transaction" in which a consumer has participated directly and voluntarily. Because PCA obtained a credit report on Pintos unrelated to any such transaction, we reverse the district court with respect to Pintos's claims against PCA and remand for further proceedings with respect to damages and to Experian's liability.

I. Background

Police officers found a sport utility vehicle belonging to Maria Pintos parked on the street in San Bruno, California on May 29, 2002. The vehicle's registration was expired. At police direction, the vehicle was towed, and the towing company, P & S Towing, obtained a lien on the vehicle for the cost of towing and impound. P & S later sold the vehicle when Pintos failed to reclaim it or pay the outstanding charges. Since the vehicle's sale price did not cover the amount owed, P & S asserted a deficiency claim against Pintos and later transferred the claim to PCA, a collection agency.[1]

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[1] California Civil Code § 3068.1(a) provides for liens "dependent upon possession for the compensation to which [a] person is legally entitled for towing, storage, or labor associated with recovery or load salvage of any vehicle subject to

PCA sought and obtained a credit report on Pintos from Experian on December 5, 2002, in connection with its effort to collect on the debt assigned by P & S. Pintos subsequently filed a complaint against PCA and Experian under the FCRA. She alleged that PCA violated the FCRA by obtaining her credit report without any FCRA-sanctioned purpose and that Experian was liable for providing the report to PCA.

PCA and Experian filed separate motions for summary judgment. Both argued that, under 15 U.S.C. § 1681b(a)(3)(A), PCA had a permissible purpose for obtaining Pintos's credit report because it was seeking to collect a debt, the towing deficiency claim. Experian further argued that it was not liable for a violation because it had fulfilled its obligations under 15 U.S.C. § 1681e, which immunizes a reporting agency against FCRA violations by the agency's subscribers so long as the agency takes certain steps.

Pintos filed a cross-motion for partial summary judgment on the issues of permissible purpose and Experian's negligence. She attached to that motion

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registration that has been authorized to be removed by a public agency." The statute also allows for lien sales with varying procedures dependent on the value of the vehicle towed and stored. *See* Cal. Civ.Code §§ 3068.1(b)-3068.1(c). In addition, a tow truck operator with a lien pursuant to § 3068.1 "has a deficiency claim against the registered owner of the vehicle if the vehicle is not leased or leased with a driver for an amount equal to the towing and storage charges, not to exceed 120 days of storage . . . less the amount received from the sale of the vehicle." Cal. Civ.Code § 3068.2(a).

several Experian documents detailing the company's internal procedures for complying with its FCRA obligations. Claiming these documents were confidential and proprietary, Experian filed a motion to seal them.

The district court granted the defendants' motions for summary judgment on November 9, 2004. Relying on *Hasbun v. County of Los Angeles*, 323 F.3d 801 (9th Cir.2003), the court agreed that debt collection was a permissible purpose under § 1681b(a)(3)(A) for PCA to obtain Pintos's credit report. The court denied Experian's motion to seal documents, without explanation.

Pintos filed a timely notice of appeal on December 8, 2004. Experian cross-appealed the district court's denial of its motion to seal on December 9, 2004. It also sought reconsideration by the district court of the denial of that motion. On April 29, 2005, the district court held that it lacked jurisdiction over the matter since Experian already appealed the order to this court. Nevertheless, the court stated that, if it had jurisdiction, it would grant Experian's motion under *Phillips v. General Motors Corp.*, 307 F.3d 1206 (9th Cir.2002), and it stayed its prior order on the subject pending the appeal.

II. Discussion

We review grants of summary judgment de novo. *ACLU v. City of Las Vegas*, 466 F.3d 784, 790 (9th Cir.2006). Cross-motions for summary judgment are evaluated separately under this same standard. *Id.* at 790-91; *Hoopa Valley Indian Tribe v. Ryan*, 415 F.3d 986, 989-90 (9th Cir.2005).

A. *15 U.S.C. § 1681b(a)(3)(A)*

"Congress enacted the FCRA in 1970 to promote efficiency in the Nation's banking system and to protect consumer privacy." *TRW Inc. v. Andrews*, 534 U.S. 19, 23, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001). Those two goals potentially lie in tension, and the FCRA strikes a balance between them. The Act authorizes credit reporting agencies to "furnish . . . consumer report[s]" because "[c]onsumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers." 15 U.S.C. §§ 1681(a)(3), 1681b(a). At the same time, the FCRA "requir[es] credit reporting agencies to maintain reasonable procedures designed to assure maximum possible accuracy of the information contained in credit reports," limits access to credit reports except for "certain statutorily enumerated purposes," and creates "a private right of action allowing injured consumers to recover any actual damages caused by negligent violations and both actual and punitive damages for willful noncompliance." *Andrews*, 534 U.S. at 23, 122 S.Ct. 441 (citations and internal quotation marks omitted).

Statutory limitations on the furnishing of credit reports are particularly relevant here. Section 1681b(a) authorizes the furnishing of credit reports only for a limited number of purposes, including, under § 1681b(a)(3)(A), the furnishing of reports "in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer." Concluding that debt collection is the "collection of an account" described in this subsection, the district

court held that the statute authorized PCA to obtain Pintos's credit report.

Section 1681b(a)(3)(A) does not provide that all "account collection" is a permissible purpose for obtaining credit reports, however. Debt collections are authorized to obtain credit reports on debtors only for account collection "in connection with a credit transaction involving the consumer." 15 U.S.C. § 1681b(a)(3)(A) (authorizing the release of credit reports "in connection with a credit transaction involving the consumer . . . *and* involving the . . . review or collection of an account") (emphasis added).

The FCRA does not define the term "credit transaction" and initially did not define the term "credit." This changed with the adoption of the Fair and Accurate Credit Transactions Act of 2003 ("FACTA"). In FACTA, Congress amended the FCRA by, *inter alia*, defining credit for purposes of the statute as amounting to a particular kind of debt: "the right granted by a creditor to a debtor to defer payment of debt or to incur debts and defer its payment or to purchase property or services and defer payment therefor."[2] *See* Pub.L. No. 108-159, § 111, 1955 (codified as amended at 15 U.S.C. § 1691a(d)). By defining credit as a "right . . . to defer

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[2] Congress enacted FACTA to "amend the Fair Credit Reporting Act, to prevent identity theft, improve resolution of consumer disputes, improve the accuracy of consumer records, make improvements in the use of, and consumer access to, credit information, and for other purposes." Pub.L. No. 108-159, 117 Stat. at 1952. Only FACTA's defining of "credit" for FCRA purposes is relevant here.

payment," FACTA indicates that a § 1681b(a)(3)(A) "credit transaction" is a transaction in which the consumer directly participates and voluntarily seeks credit. *Accord Stergiopoulos v. First Midwest Bancorp, Inc.*, 427 F.3d 1043, 1047 (7th Cir.2005) (holding that § 1681b(a)(3)(A) applies "only if the consumer initiates [a credit] transaction"). Not all "debt" involves a "credit transaction."

Interpreting "credit transaction" to require voluntary consumer participation comports with the FCRA's underlying goal of protecting consumer privacy. *See Andrews*, 534 U.S. at 23, 122 S.Ct. 441 (noting that Congress enacted the FCRA "to protect consumer privacy," among other goals, and identifying § 1681b specifically as embodying this purpose). A consumer who chooses to initiate a credit transaction implicitly consents to the release of his credit report for related purposes. By requiring this consent, § 1681b(a)(3)(A) forges a "direct link" between a consumer's search for credit and the furnishing of his credit report. *See Stergiopoulos*, 427 F.3d at 1047. This link is critical for providing the consumer with some degree of privacy protection in accordance with the underlying purposes of the FCRA. *Id.* ("If the connection between a consumer's search and a [credit] request is clear, it is unlikely that the request will infringe the consumer's privacy interests, for it will 'involve' the plaintiff directly.").

Here, Pintos did not voluntarily seek credit. Rather, the debt arose by statute when the lien sale price of her vehicle failed to cover the towing and impound charges. *See* Cal Civ.Code § 3068.2. Pintos never sought to have her vehicle towed, and she incurred the resulting debt involuntarily.

Consequently, no one granted her "credit" as defined by § 1681a(r)(5), and there was no "credit transaction" within the meaning of § 1681b(a)(3)(A). PCA, therefore, had no purpose specified as permissible under the statute to obtain Pintos's credit report.

In reaching the opposite conclusion, the district court relied on our decision in *Hasbun*. *Hasbun* presented the question of whether a government agency looking to enforce a child support judgment could obtain a credit report on a judgment debtor under § 1681b(a)(3)(A). 323 F.3d at 802-03. The court determined that debt collection was generally a permissible purpose for obtaining credit reports under § 1681b(a)(3)(A), and that the government, which stood in the shoes of the judgment creditor, could, like any other creditor, obtain credit reports for debt collection. *Id.* at 803-04, 805 (holding that the government agency "was engaged in the 'collection of an account' under 15 U.S.C. § 1681b(a)(3)(A) and therefore had a permissible purpose for obtaining [the credit report]"). Relying on *Hasbun*, the district court concluded that PCA had a permissible purpose to obtain Pintos's credit report because it, too, was engaged in debt collection.

This reading of *Hasbun* was not unreasonable at the time. *Hasbun* was decided prior to the 2003 FACTA amendments, however, and it must be reevaluated in light of the 12956 amended FCRA.[3]

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[3] We are not faced with the question addressed in *Hasbun*, that is, "when and how a child support enforcement agency may lawfully obtain the consumer credit report of an individual who has fallen behind in paying court ordered child support."

See United States v. McNeil, 362 F.3d 570, 574 (9th Cir.2004) (holding that "when Congress amends statutes, our decisions that rely on the older versions of the statutes must be reevaluated in light of the amended statute"). By defining "credit" for purposes of the FCRA, FACTA helped to clarify the specific circumstances in which credit reporting agencies may furnish credit reports to debt collectors under § 1681b(a)(3)(A). Post-FACTA, it is apparent that debt collection is not *always* a permissible purpose for obtaining credit reports. To the extent that the *Hasbun* court read § 1681b(a)(3)(A) more broadly, its pre-FACTA interpretation is no longer persuasive.[4]

Because PCA obtained Pintos's credit report for debt collection efforts unrelated to a proper credit

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Hasbun, 323 F.3d at 802. We thus take no position on the merits of that decision and merely reevaluate § 1681b(a)(3)(A) in light of FACTA and the facts presented by this case.

[4] The same is true of the Federal Trade Commission's (FTC) nonbinding commentary regarding judgment creditors, on which the *Hasbun* court relied. *See Hasbun*, 323 F.3d at 803 (citing 16 C.F.R. Pt. 600, App. at 509 (2002)). Although the FTC commentary suggests that a "judgment creditor has a permissible purpose to receive a consumer report on the judgment debtor for use in connection with collection of the judgment debt, because it is in the same position as any creditor attempting to collect a debt from a consumer," *id.*, a 2002 interpretation of the FCRA provides little insight into the post-FACTA meaning of § 1681b(a)(3)(A). The pre-FACTA authorities relied on by the *Hasbun* court are unpersuasive for the same reason. *See, e.g., Duncan v. Handmaker*, 149 F.3d 424, 428 (6th Cir.1998); *Baker v. Bronx-Westchester Investigations, Inc.*, 850 F.Supp. 260, 262-63 (S.D.N.Y.1994).

transaction, it violated the FCRA.[5] Accordingly, we reverse the district court's summary judgment in favor of the defendants.

B. 15 U.S.C. § 1681e

We next consider whether Experian is also liable for PCA's violation of the FCRA. The district court did not reach this issue, as it determined, incorrectly, that PCA had a permissible purpose to obtain Pintos's credit report. Experian argues that because 15 U.S.C. § 1681e immunizes it from subscribers' FCRA violations, the statute offers an alternative basis to affirm the summary judgment with respect to its liability.

A credit reporting agency may be liable for its subscriber's violation when the agency fails to comply with the statutory obligations imposed by 15 U.S.C. § 1681e. *See Guimond v. Trans Union Credit Info. Co.*, 45 F.3d 1329, 1333 (9th Cir.1995). Experian argues that because PCA gave it a "blanket certification"-a written promise to use Experian's credit reports only for permissible purposes-the agency satisfied its statutory obligations under § 1681e. We disagree.

Section 1681e requires more from a credit reporting agency than merely obtaining a subscriber's general promise to obey the law. After

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[5] PCA and Experian only argue that § 1681b(a)(3)(A) authorized PCA to obtain Pintos's credit report. Thus, we need not determine whether PCA had a permissible purpose under any other § 1681b subsection. In addition, the parties do not argue, and we do not address, whether PCA's pre-FACTA conduct may subject it to penalties under a post-FACTA reading of the FCRA.

prospective subscribers "certify the purposes for which [credit] information is sought, and certify that the information will be used for no other purpose," the reporting agency must make "a reasonable effort" to verify the certifications and may not furnish reports if "reasonable grounds" exist to believe that reports will be used impermissibly. 15 U.S.C. § 1681e(a). Under the plain terms of § 1681e(a), a subscriber's certification cannot absolve the reporting agency of its independent obligation to verify the certification and determine that no reasonable grounds exist for suspecting impermissible use.[6] Blanket certification cannot eliminate all genuine

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[6] Experian suggests that *Davis v. Asset Servs.*, 46 F.Supp.2d 503, 508 (M.D.La.1998), *Boothe v. TRW Credit Data*, 557 F.Supp. 66, 71 (S.D.N.Y.1982), and *Hiemstra v. TRW, Inc.*, 195 Cal.App.3d 1629, 1634, 241 Cal.Rptr. 564 (Cal.Ct.App.1987) support the contention that blanket certifications will satisfy a credit reporting agency's obligations under § 1681e(a). While these cases hold that credit reporting agencies may rely on blanket certifications rather than having to verify credit requests individually, none provides that a blanket certification by itself is sufficient to satisfy the § 1681e inquiry. *See, e.g., Davis*, 46 F.Supp.2d at 508 (holding that the defendant complied with the requirements of § 1681e(a) because it obtained a blanket certification *and* because the plaintiff did not submit "any evidence to prove that the [defendant] knew or should have had reason to know that [the subscriber] would access the report for an impermissible purpose"); *Boothe*, 557 F.Supp. at 71 (finding no violation where the primary business of the requesting entity used reports for a permissible purpose and there was "no showing that TRW knew of the improper purpose for the report issued"). Even if Experian did not have to verify PCA's request for Pintos's credit report individually, § 1681e(a) still required proper verification of PCA generally.

issues of material fact with regard to Experian's liability.

C. Experian's Motion to File Documents Under Seal

Two standards generally govern motions to seal documents like the one at issue here.[7] First, a "compelling reasons" standard applies to most judicial records. *See Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1178 (9th Cir.2006) (holding that "[a] party seeking to seal a judicial record . . . bears the burden of overcoming . . . the 'compelling reasons' standard"); *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135-36 (9th Cir.2003). This standard derives from the common law right "to inspect and copy public records and documents, including judicial records and documents." *Kamakana*, 447 F.3d at 1178 (citation and internal quotation marks omitted). To limit this common law right of access, a party seeking to seal judicial records must show that "compelling reasons supported by specific factual findings . . . outweigh the general history of access and the public policies favoring disclosure." *Id.* (internal quotation marks and citations omitted).

"[P]rivate materials unearthed during discovery" are not part of the judicial record. *Id.* at 1180. A different standard applies to that category, from Rule

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[7] A third standard covers the "narrow range of documents" such as "grand jury transcripts" and certain "warrant materials" that "traditionally [have] been kept secret for important policy reasons." *Kamakana*, 447 F.3d at 1178. No party asserts this third standard is relevant here.

26(c) of the Federal Rules of Civil Procedure, which provides that a trial court may grant a protective order "which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."

The relevant standard for purposes of Rule 26(c) is whether " 'good cause' exists to protect th[e] information from being disclosed to the public by balancing the needs for discovery against the need for confidentiality." *Phillips v. General Motors Corp.*, 307 F.3d 1206, 1213 (9th Cir.2002). This "good cause" standard presents a lower burden for the party wishing to seal documents than the "compelling reasons" standard. The cognizable public interest in judicial records which underlies the "compelling reasons" standard does not exist for documents produced between private litigants. *See Foltz*, 331 F.3d at 1134 ("When discovery material is filed with the court . . . its status changes."); *Kamakana*, 447 F.3d at 1180 (holding that "[d]ifferent interests are at stake with the right of access than with Rule 26(c)").

The "good cause" standard is not limited to discovery. In *Phillips*, we held that "good cause" is also the proper standard when a party seeks access to previously sealed discovery attached to a nondispositive motion. 307 F.3d at 1213 ("[W]hen a party attaches a sealed discovery document to a nondispositive motion, the usual presumption of the public's right of access is rebutted."). Nondispositive motions "are often 'unrelated, or only tangentially related,' to the underlying cause of action," and, as a result, the public's interest in accessing dispositive materials "do[es] not apply with equal force" to nondispositive materials. *Kamakana*, 447 F.3d at

1179 (citation omitted). In light of the weaker public interest in nondispositive materials, we apply the "good cause" standard when parties wish to keep them under seal. Applying the "compelling interest" standard under these circumstances would needlessly "undermine a district court's power to fashion effective protective orders." *Foltz*, 331 F.3d at 1135.

Experian wishes to seal documents attached to Pintos's cross-motion for summary judgment. Rule 26(c) does not govern these documents because they are not "private materials unearthed during discovery" but have become part of the judicial record. *Kamakana*, 447 F.3d at 1180. Additionally, the documents do not fall within the *Phillips* exception to the general presumption of access because Pintos's motion was dispositive.[8] *See Foltz*, 331 F.3d at 1135 (holding that the *Phillips* exception is "expressly limited to the status of materials . . . attached to a non-dispositive motion" (emphasis omitted)). Consequently, Experian must overcome a strong presumption of access by showing that "compelling reasons supported by specific factual

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[8] This case differs slightly from *Phillips*, in which a nonparty sought access to court records previously filed under seal. *Phillips*, 307 F.3d at 1209. Here no third party seeks access to previously sealed documents, but this is a distinction without a difference. It is undisputed that a "strong presumption of access to judicial records applies fully to dispositive pleadings." *Kamakana*, 447 F.3d at 1179. Accordingly, whether a third party has sought access is immaterial when a party moves to seal documents already filed with the court. *See id.* (holding simply that " 'compelling reasons' must be shown to seal judicial records attached to a dispositive motion").

findings . . . outweigh the general history of access and the public policies favoring disclosure." *Kamakana*, 447 F.3d at 1179-80 (internal quotation marks and citations omitted).

Under the "compelling reasons" standard, a district court must weigh "relevant factors,"[9] base its decision "on a compelling reason," and "articulate the factual basis for its ruling . . . without relying on hypothesis or conjecture." *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir.1995). A proper analysis is reviewed for abuse of discretion. *Foltz*, 331 F.3d at 1135. An order that fails to articulate its reasoning must be vacated and remanded because "[m]eaningful appellate review is impossible" when the appellate panel has no way of knowing "whether relevant factors were considered and given appropriate weight." *Hagestad*, 49 F.3d at 1434-35 (internal quotation marks omitted).

The district court's November 9, 2004 denial of Experian's motion to seal offered no explanation for the decision. The explanation provided in the court's April 29, 2005 order denying Experian's motion to alter or amend judgment did not fill the gap. With the case already on appeal, the district court denied Experian's motion on jurisdictional grounds but suggested that it would grant Experian's motion if it

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[9] "Relevant factors" include the "public interest in understanding the judicial process and whether disclosure of the material could result in improper use of the material for scandalous or libelous purposes or infringement upon trade secrets." *Hagestad*, 49 F.3d at 1434 (quoting *EEOC v. Erection Co., Inc.*, 900 F.2d 168, 170 (9th Cir.1990)).

still had jurisdiction, staying its prior order to file the documents in the public record pending our resolution of the appeal. According to the district court, *Phillips* would govern the motion and good cause existed for placing Experian's documents under seal.

Because the documents at issue here were attached to a dispositive motion, however, *Phillips* does not provide the proper standard. A determination by the district court that good cause exists for sealing Experian's documents does not establish that there are "compelling reasons" to do so. *See Kamakana*, 447 F.3d at 1180 (holding that "a 'good cause' showing ... will not suffice to fulfill the 'compelling reasons' standard that a party must meet to rebut the presumption of access to dispositive pleadings and attachments"). Instead, the court must decide whether compelling reasons exist to seal the documents. *Foltz*, 331 F.3d at 1135-36. We vacate and remand "for the making of findings in support of an[ ] order on this issue," *Hagestad*, 49 F.3d at 1435, in light of the proper legal standard.

III. Conclusion

We reverse the district court's summary judgment in favor of defendants and remand for further proceedings. Additionally, we vacate the district court's order denying Experian's motion to seal documents and remand for consideration in light of the proper legal standard.

REVERSED; REMANDED FOR FURTHER PROCEEDINGS.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MARIA E. PINTOS, Plaintiff, v. PACIFIC CREDITORS ASSOCIATION and EXPERIAN INFORMATIONAL SOLUTIONS, INC. Defendants. /	No. C 03-5471 CW ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, Defendants Pacific Creditors Association and Experian Informational Solutions, Inc. each move for summary judgment on Plaintiff Maria E. Pintos' claims under the Fair Credit Reporting Act, 15 U.S.C. section 1681 *et seq.* Plaintiff opposes the motions and cross-moves for summary judgment. The matter was heard on November 5, 2004. Having considered the parties' papers and oral argument on the motions, the Court GRANTS Defendants' motions

for summary judgment and DENIES Plaintiff's cross-motion for summary judgment.

BACKGROUND

Defendant Pacific Creditors Associations (PCA) is a collection agency that specializes in deficiency claims for towing companies. Defendant Experian Informational Solutions, Inc. (Experian) is a consumer credit reporting agency that gathers credit information and makes it available to third-party subscribers. In 1987, PCA entered into a subscriber agreement with Experian's predecessor, and PCA continues to subscribe to Experian's credit reporting services. Plaintiff is an individual residing in San Mateo, California.

On May 29, 2002, the San Bruno Police Department instructed P&S Towing to tow and impound a Chevrolet Suburban because the registration tags were expired. At the time it was towed, the vehicle was registered to both Plaintiff and her son, David Pintos. Plaintiff contends that the car was owned solely by her son and that she instructed him to transfer title of the vehicle to his name back in 1999. Nevertheless, according to California Department of Motor Vehicles records, on May 29 the vehicle was registered in both Plaintiff's and her son's names, and title did not transfer to David Pintos as sole owner until June 18, 2002. Ellis Decl., Ex. G.[1]

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[1] The Court takes judicial notice of exhibits G and H to the Ellis declaration in support of PCA's motion for summary judgment.

P&S Towing sent a "Notice of Pending Lien Sale" to Plaintiff and her son on June 7, 2004, indicating that it held a lien on the vehicle for towing and impound charges and the car would be sold at a July 9 lien sale if Plaintiff or her son did not pay the debt and reclaim the vehicle. The vehicle was not reclaimed and, following the lien sale, P&S Towing transferred the deficiency for towing and impounding to PCA for collection.

On December 5, 2002, after failing to secure payment on Plaintiff's debt, PCA obtained Plaintiff's credit information from Experian's database. On December 4, 2003, Plaintiff filed a complaint against both PCA and Experian, alleging violations of the Fair Credit Reporting Act (FCRA). Plaintiff alleges that PCA did not have a legally permissible purpose to obtain her credit report, and that Experian was negligent in furnishing PCA with her credit report for an impermissible purpose.

LEGAL STANDARD

Summary judgment is properly granted when no genuine and disputed issues of material fact remain, and when, viewing the evidence most favorably to the non-moving party, the movant is clearly entitled to prevail as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Eisenberg v. Ins. Co. of N. Am.*, 815 F.2d 1285, 1288-89 (9th Cir. 1987).

The moving party bears the burden of showing that there is no material factual dispute. Therefore, the court must regard as true the opposing party's evidence, if supported by affidavits or other evidentiary material. *Celotex*, 477 U.S. at 324; *Eisenberg*, 815 F.2d at 1289. The court must draw

all reasonable inferences in favor of the party against whom summary judgment is sought. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Intel Corp. v. Hartford Accident & Indem. Co.*, 952 F.2d 1551, 1558 (9th Cir. 1991).

Where the moving party does not bear the burden of proof on an issue at trial, the moving party may discharge its burden of showing that no genuine issue of material fact remains by demonstrating that "there is an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S at 325. The moving party is not required to produce evidence showing the absence of a material fact on such issues, nor must the moving party support its motion with evidence negating the non-moving party's claim. *Id.*; *see also Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 885 (1990); *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991), *cert. denied*, 502 U.S. 994 (1991). If the moving party shows an absence of evidence to support the non-moving party's case, the burden then shifts to the opposing party to produce "specific evidence, through affidavits or admissible discovery material, to show that the dispute exists." *Bhan*, 929 F.2d at 1409. A complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. *Celotex*, 477 U.S. at 323.

DISCUSSION

Plaintiff's negligence claim against Experian turns on whether the credit reporting agency has reasonable procedures in place to ensure that its clients only use credit reports obtained from its database for permissible purposes. 15 U.S.C. § 1681e(a). However, both claims fail if PCA did in fact

have a legally permissible purpose under FCRA to obtain Plaintiff's credit report from Experian. *See, e.g., Washington v. CSC Credit Servs., Inc.*, 199 F.3d 263, 267 (5th Cir. 2000)("Accordingly, a plaintiff bringing a claim that a reporting agency violated the 'reasonable procedures' requirement of § 1681e must first show that the reporting agency released the report in violation of § 1681b.").

Title 15 U.S.C. section 1681b, entitled "Permissible purposes of consumer reports," states, in pertinent part, that a consumer reporting agency may furnish a consumer credit report to a person it has reason to believe "intends to use the information in connection with a . . . review or collection of an account of, the consumer." 15 U.S.C. § 1681b(a)(3)(A). The issue of whether a credit report has been obtained for a permissible purpose is a question of law that may properly be decided in the context of a motion for summary judgment. *Edge v. Prof'l Claims Bureau, Inc.*, 64 F. Supp. 2d 115, 117 (E.D.N.Y. 1999); *see also Hasbun v. County of Los Angeles*, 323 F.3d 801 (9th Cir. 2003)(affirming district court's grant of summary judgment for the defendant on issue of "permissible purpose" under 15 U.S.C. § 1681b).

Plaintiff argues that PCA did not have a legally permissible purpose for obtaining her credit information from Experian because "collection of an account" as used in section 1681b(a)(3)(A) does not include an attempt to collect on a towing deficiency claim. Plaintiff relies on several maxims of statutory construction and on commentary by the Federal Trade Commission in arguing that "collection of an account" includes only collection of *credit* accounts and does not encompass debts. The debt Plaintiff

owes to PCA is not a credit account because it does not include "*terms* that have been agreed upon between the consumer and the creditor." Pl.'s Opp'n Br. at 8 (emphasis in original).

Plaintiff's argument is contrary to settled law in the Ninth Circuit. In *Hasbun*, the Ninth Circuit ruled:

> "Collection of an account" is nowhere defined in the statute, and the legislative history is not enlightening. But the limited case law addressing this issue has uniformly held that creditors have a permissible purpose in receiving a consumer report to assist them in collecting a debt. In other words, collection of a debt is considered to be the "collection of an account."

323 F.3d at 803. That holding was followed by a judge in this District in *Perretta v. Capital Acquisitions & Mgmt.*, 2003 WL 21383757 (N.D. Cal. 2003). In *Perretta*, the court granted the defendant collection agency's motion to dismiss the plaintiff's claim under FCRA because the court ruled that, under section 1681b, "a party is permitted to obtain an individual's credit information in connection with the collection of a debt." 2003 WL 21383757 at *5.

To support her position that debt collection is not covered under section 1681b, Plaintiff cites two cases, neither of which is analogous to her case. *Mone v. Dranow*, 945 F.2d 306 (9th Cir. 1991), in addressing the "business need" provision of section 1681b, ruled that obtaining a credit report for the purpose of determining ability to pay a judgment in a pending lawsuit is not permissible under FCRA. In *Duncan v.*

Handmaker, 149 F.3d 424 (6th Cir. 1998), the court ruled that, under section 1681b, litigants in a tort action could not obtain credit reports on the opposing party for the purpose of preparing for trial. Neither case cited by Plaintiff addresses whether debt collection is a permissible purpose for obtaining a credit report under FCRA, and thus neither case supports Plaintiff's argument.

In order to defeat a claim under section 1681b, the "law requires no more" than a showing of a permissible purpose. *Hasbun*, 323 F.3d at 805. Collection of a debt is a permissible purpose for obtaining a credit report under section 1681b, and thus PCA and Experian are entitled to summary judgment on Plaintiff's claims arising under FCRA. This ruling does not require the Court to decide whether Experian would have been liable under section 1681c if PCA had not had a permissible purpose for obtaining Plaintiff's credit report.

CONCLUSION

For the foregoing reasons, Defendants' motions for summary judgment are GRANTED and Plaintiff's cross-motion for summary judgment is DENIED. PCA's request for judicial notice in support of its motion (Docket No. 62) is GRANTED. Experian's request that the Court file under seal documents filed by Plaintiff in support of her cross-motion and in opposition to Defendants' motions (Docket No. 76) is DENIED. Judgment shall enter accordingly. Defendants shall recover their costs from Plaintiff. The Clerk shall prepare a judgment and close the file.

IT IS SO ORDERED.

Dated: 11/9/04

/s/ CLAUDIA WILKEN
CLAUDIA WILKEN
United States District Judge

APPENDIX E

FILED

OCT 23 2009

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARIA E. PINTOS, *Plaintiff-Appellant,* v. PACIFIC CREDITORS ASSOCIATION; EXPERIAN INFORMATION SOLUTIONS, INC., *Defendants-Appellees.*	No. 04-17485 D.C. No. CV-03-05471-CW ORDER

MARIA E. PINTOS, *Plaintiff-Appellee,* v. PACIFIC CREDITORS ASSOCIATION, *Defendant,* and EXPERIAN INFORMATION SOLUTIONS, INC., *Defendant-Appellant.*	No. 04-17558 D.C. No. CV-03-05471-CW

Before: SCHROEDER, CLIFTON, and BEA, Circuit Judges.

The parties are directed to file simultaneous supplemental briefs, not to exceed 2,500 words, addressing the significance to this case, if any, of 15 U.S.C. §§ 1681a(m) and 1681b(c). The briefs are due within 30 days of the date this order is filed. Parties who are registered for ECF must file the response electronically without submission of paper copies. Parties who are not registered ECF filers must file the original response plus 50 paper copies.

APPENDIX F

Title 15. Commerce and Trade

Chapter 41. Consumer Credit Protection

Subchapter III. Credit Reporting Agencies

§ 1681b. Permissible purposes of consumer reports

(a) In general

Subject to subsection (c) of this section, any consumer reporting agency may furnish a consumer report under the following circumstances and no other:

(1) In response to the order of a court having jurisdiction to issue such an order, or a subpoena issued in connection with proceedings before a Federal grand jury.

(2) In accordance with the written instructions of the consumer to whom it relates.

(3) To a person which it has reason to believe--

(A) intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or

(B) intends to use the information for employment purposes; or

(C) intends to use the information in connection with the underwriting of insurance involving the consumer; or

(D) intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status; or

(E) intends to use the information, as a potential investor or servicer, or current insurer, in connection with a valuation of, or an assessment of the credit or prepayment risks associated with, an existing credit obligation; or

(F) otherwise has a legitimate business need for the information--

(i) in connection with a business transaction that is initiated by the consumer; or

(ii) to review an account to determine whether the consumer continues to meet the terms of the account.

(G) executive departments and agencies in connection with the issuance of government-sponsored individually-billed travel charge cards.

(4) In response to a request by the head of a State or local child support enforcement agency (or a State or local government official authorized by the head of such an agency), if the person making the request certifies to the consumer reporting agency that--

(A) the consumer report is needed for the purpose of establishing an individual's capacity to make child support payments or determining the appropriate level of such payments;

(B) the paternity of the consumer for the child to which the obligation relates has been established or acknowledged by the consumer in accordance with State laws under which the obligation arises (if required by those laws);

(C) the person has provided at least 10 days' prior notice to the consumer whose report is requested, by certified or registered mail to the last known address of the consumer, that the report will be requested; and

(D) the consumer report will be kept confidential, will be used solely for a purpose described in subparagraph (A), and will not be used in connection with any other civil, administrative, or criminal proceeding, or for any other purpose.

(5) To an agency administering a State plan under section 654 of Title 42 for use to set an initial or modified child support award.

(6) To the Federal Deposit Insurance Corporation or the National Credit Union Administration as part of its preparation for its appointment or as part of its exercise of powers, as conservator, receiver, or liquidating agent for an insured depository institution or insured credit union under the Federal Deposit Insurance Act or the Federal Credit Union Act, or other applicable Federal or State law, or in connection with the resolution or liquidation of a failed or failing insured depository institution or insured credit union, as applicable.

(b) Conditions for furnishing and using consumer reports for employment purposes

(1) Certification from user

A consumer reporting agency may furnish a consumer report for employment purposes only if--

(A) the person who obtains such report from the agency certifies to the agency that--

(i) the person has complied with paragraph (2) with respect to the consumer report, and the person will comply with paragraph (3) with respect to the consumer report if paragraph (3) becomes applicable; and

(ii) information from the consumer report will not be used in violation of any applicable Federal or State equal employment opportunity law or regulation; and

(B) the consumer reporting agency provides with the report, or has previously provided, a summary of the consumer's rights under this subchapter, as prescribed by the Federal Trade Commission under section 1681g(c)(3) of this title.

(2) Disclosure to consumer

(A) In general

Except as provided in subparagraph (B), a person may not procure a consumer report, or cause a consumer report to be procured, for employment purposes with respect to any consumer, unless--

(i) a clear and conspicuous disclosure has been made in writing to the consumer at any time before the report is procured or caused to be procured, in a document that consists solely of the disclosure, that a consumer report may be obtained for employment purposes; and

(ii) the consumer has authorized in writing (which authorization may be made on the document

referred to in clause (i)) the procurement of the report by that person.

(B) Application by mail, telephone, computer, or other similar means

If a consumer described in subparagraph (C) applies for employment by mail, telephone, computer, or other similar means, at any time before a consumer report is procured or caused to be procured in connection with that application--

(i) the person who procures the consumer report on the consumer for employment purposes shall provide to the consumer, by oral, written, or electronic means, notice that a consumer report may be obtained for employment purposes, and a summary of the consumer's rights under section 1681m(a)(3) of this title; and

(ii) the consumer shall have consented, orally, in writing, or electronically to the procurement of the report by that person.

(C) Scope

Subparagraph (B) shall apply to a person procuring a consumer report on a consumer in connection with the consumer's application for employment only if--

(i) the consumer is applying for a position over which the Secretary of Transportation has the power to establish qualifications and maximum hours of service pursuant to the provisions of section 31502 of Title 49, or a position subject to safety regulation by a State transportation agency; and

(ii) as of the time at which the person procures the report or causes the report to be procured the only interaction between the consumer and the person in connection with that employment

application has been by mail, telephone, computer, or other similar means.

(3) Conditions on use for adverse actions

(A) In general

Except as provided in subparagraph (B), in using a consumer report for employment purposes, before taking any adverse action based in whole or in part on the report, the person intending to take such adverse action shall provide to the consumer to whom the report relates--

(i) a copy of the report; and

(ii) a description in writing of the rights of the consumer under this subchapter, as prescribed by the Federal Trade Commission under section 1681g(c)(3) of this title.

(B) Application by mail, telephone, computer, or other similar means

(i) If a consumer described in subparagraph (C) applies for employment by mail, telephone, computer, or other similar means, and if a person who has procured a consumer report on the consumer for employment purposes takes adverse action on the employment application based in whole or in part on the report, then the person must provide to the consumer to whom the report relates, in lieu of the notices required under subparagraph (A) of this section and under section 1681m(a) of this title, within 3 business days of taking such action, an oral, written or electronic notification--

(I) that adverse action has been taken based in whole or in part on a consumer report received from a consumer reporting agency;

(II) of the name, address and telephone number of the consumer reporting agency that furnished the consumer report (including a toll-free telephone number established by the agency if the agency compiles and maintains files on consumers on a nationwide basis);

(III) that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide to the consumer the specific reasons why the adverse action was taken; and

(IV) that the consumer may, upon providing proper identification, request a free copy of a report and may dispute with the consumer reporting agency the accuracy or completeness of any information in a report.

(ii) If, under clause (B)(i)(IV), the consumer requests a copy of a consumer report from the person who procured the report, then, within 3 business days of receiving the consumer's request, together with proper identification, the person must send or provide to the consumer a copy of a report and a copy of the consumer's rights as prescribed by the Federal Trade Commission under section 1681g(c)(3) of this title.

(C) Scope

Subparagraph (B) shall apply to a person procuring a consumer report on a consumer in connection with the consumer's application for employment only if--

(i) the consumer is applying for a position over which the Secretary of Transportation has the power to establish qualifications and maximum hours of service pursuant to the provisions of section 31502 of

Title 49, or a position subject to safety regulation by a State transportation agency; and

(ii) as of the time at which the person procures the report or causes the report to be procured the only interaction between the consumer and the person in connection with that employment application has been by mail, telephone, computer, or other similar means.

(4) Exception for national security investigations

(A) In general

In the case of an agency or department of the United States Government which seeks to obtain and use a consumer report for employment purposes, paragraph (3) shall not apply to any adverse action by such agency or department which is based in part on such consumer report, if the head of such agency or department makes a written finding that--

(i) the consumer report is relevant to a national security investigation of such agency or department;

(ii) the investigation is within the jurisdiction of such agency or department;

(iii) there is reason to believe that compliance with paragraph (3) will--

(I) endanger the life or physical safety of any person;

(II) result in flight from prosecution;

(III) result in the destruction of, or tampering with, evidence relevant to the investigation;

(IV) result in the intimidation of a potential witness relevant to the investigation;

(V) result in the compromise of classified information; or

(VI) otherwise seriously jeopardize or unduly delay the investigation or another official proceeding.

(B) Notification of consumer upon conclusion of investigation

Upon the conclusion of a national security investigation described in subparagraph (A), or upon the determination that the exception under subparagraph (A) is no longer required for the reasons set forth in such subparagraph, the official exercising the authority in such subparagraph shall provide to the consumer who is the subject of the consumer report with regard to which such finding was made--

(i) a copy of such consumer report with any classified information redacted as necessary;

(ii) notice of any adverse action which is based, in part, on the consumer report; and

(iii) the identification with reasonable specificity of the nature of the investigation for which the consumer report was sought.

(C) Delegation by head of agency or department

For purposes of subparagraphs (A) and (B), the head of any agency or department of the United States Government may delegate his or her authorities under this paragraph to an official of such agency or department who has personnel security responsibilities and is a member of the Senior Executive Service or equivalent civilian or military rank.

(D) Definitions

For purposes of this paragraph, the following definitions shall apply:

(i) Classified information.--The term "classified information" means information that is protected from unauthorized disclosure under Executive Order No. 12958 or successor orders.

(ii) National security investigation.--The term "national security investigation" means any official inquiry by an agency or department of the United States Government to determine the eligibility of a consumer to receive access or continued access to classified information or to determine whether classified information has been lost or compromised.

(c) Furnishing reports in connection with credit or insurance transactions that are not initiated by the consumer

(1) In general

A consumer reporting agency may furnish a consumer report relating to any consumer pursuant to subparagraph (A) or (C) of subsection (a)(3) of this section in connection with any credit or insurance transaction that is not initiated by the consumer only if--

(A) the consumer authorizes the agency to provide such report to such person; or

(B)(i) the transaction consists of a firm offer of credit or insurance;

(ii) the consumer reporting agency has complied with subsection (e) of this section;

(iii) there is not in effect an election by the consumer, made in accordance with subsection (e) of this section, to have the consumer's name and address excluded from lists of names provided by the agency pursuant to this paragraph; and

(iv) the consumer report does not contain a date of birth that shows that the consumer has not attained the age of 21, or, if the date of birth on the consumer report shows that the consumer has not attained the age of 21, such consumer consents to the consumer reporting agency to such furnishing.

(2) Limits on information received under paragraph (1)(B)

A person may receive pursuant to paragraph (1)(B) only--

(A) the name and address of a consumer;

(B) an identifier that is not unique to the consumer and that is used by the person solely for the purpose of verifying the identity of the consumer; and

(C) other information pertaining to a consumer that does not identify the relationship or experience of the consumer with respect to a particular creditor or other entity.

(3) Information regarding inquiries

Except as provided in section 1681g(a)(5) of this title, a consumer reporting agency shall not furnish to any person a record of inquiries in connection with a credit or insurance transaction that is not initiated by a consumer.

(d) Reserved

(e) Election of consumer to be excluded from lists

(1) In general

A consumer may elect to have the consumer's name and address excluded from any list provided by a consumer reporting agency under subsection (c)(1)(B) of this section in connection with a credit or

insurance transaction that is not initiated by the consumer, by notifying the agency in accordance with paragraph (2) that the consumer does not consent to any use of a consumer report relating to the consumer in connection with any credit or insurance transaction that is not initiated by the consumer.

(2) Manner of notification

A consumer shall notify a consumer reporting agency under paragraph (1)--

(A) through the notification system maintained by the agency under paragraph (5); or

(B) by submitting to the agency a signed notice of election form issued by the agency for purposes of this sub-paragraph.

(3) Response of agency after notification through system

Upon receipt of notification of the election of a consumer under paragraph (1) through the notification system maintained by the agency under paragraph (5), a consumer reporting agency shall--

(A) inform the consumer that the election is effective only for the 5-year period following the election if the consumer does not submit to the agency a signed notice of election form issued by the agency for purposes of paragraph (2)(B); and

(B) provide to the consumer a notice of election form, if requested by the consumer, not later than 5 business days after receipt of the notification of the election through the system established under paragraph (5), in the case of a request made at the time the consumer provides notification through the system.

(4) Effectiveness of election

An election of a consumer under paragraph (1)--

(A) shall be effective with respect to a consumer reporting agency beginning 5 business days after the date on which the consumer notifies the agency in accordance with paragraph (2);

(B) shall be effective with respect to a consumer reporting agency--

(i) subject to subparagraph (C), during the 5-year period beginning 5 business days after the date on which the consumer notifies the agency of the election, in the case of an election for which a consumer notifies the agency only in accordance with paragraph (2)(A); or

(ii) until the consumer notifies the agency under subparagraph (C), in the case of an election for which a consumer notifies the agency in accordance with paragraph (2)(B);

(C) shall not be effective after the date on which the consumer notifies the agency, through the notification system established by the agency under paragraph (5), that the election is no longer effective; and

(D) shall be effective with respect to each affiliate of the agency.

(5) Notification system

(A) In general

Each consumer reporting agency that, under subsection (c)(1)(B) of this section, furnishes a consumer report in connection with a credit or insurance transaction that is not initiated by a consumer, shall--

(i) establish and maintain a notification system, including a toll-free telephone number, which permits any consumer whose consumer report is maintained by the agency to notify the agency, with appropriate identification, of the consumer's election to have the consumer's name and address excluded from any such list of names and addresses provided by the agency for such a transaction; and

(ii) publish by not later than 365 days after September 30, 1996, and not less than annually thereafter, in a publication of general circulation in the area served by the agency--

(I) a notification that information in consumer files maintained by the agency may be used in connection with such transactions; and

(II) the address and toll-free telephone number for consumers to use to notify the agency of the consumer's election under clause (i).

(B) Establishment and maintenance as compliance

Establishment and maintenance of a notification system (including a toll-free telephone number) and publication by a consumer reporting agency on the agency's own behalf and on behalf of any of its affiliates in accordance with this paragraph is deemed to be compliance with this paragraph by each of those affiliates.

(6) Notification system by agencies that operate nationwide

Each consumer reporting agency that compiles and maintains files on consumers on a nationwide basis shall establish and maintain a notification system for

purposes of paragraph (5) jointly with other such consumer reporting agencies.

(f) Certain use or obtaining of information prohibited

A person shall not use or obtain a consumer report for any purpose unless--

(1) the consumer report is obtained for a purpose for which the consumer report is authorized to be furnished under this section; and

(2) the purpose is certified in accordance with section 1681e of this title by a prospective user of the report through a general or specific certification.

(g) Protection of medical information

(1) Limitation on consumer reporting agencies

A consumer reporting agency shall not furnish for employment purposes, or in connection with a credit or insurance transaction, a consumer report that contains medical information (other than medical contact information treated in the manner required under section 605(a)(6) of this title) about a consumer, unless—

(A) if furnished in connection with an insurance transaction, the consumer affirmatively consents to the furnishing of the report;

(B) if furnished for employment purposes or in connection with a credit transaction--

(i) the information to be furnished is relevant to process or effect the employment or credit transaction; and

(ii) the consumer provides specific written consent for the furnishing of the report that describes in clear

and conspicuous language the use for which the information will be furnished; or

(C) the information to be furnished pertains solely to transactions, accounts, or balances relating to debts arising from the receipt of medical services, products, or devises, where such information, other than account status or amounts, is restricted or reported using codes that do not identify, or do not provide information sufficient to infer, the specific provider or the nature of such services, products, or devices, as provided in section 1681c(a)(6) of this title.

(2) Limitation on creditors

Except as permitted pursuant to paragraph (3)(C) or regulations prescribed under paragraph (5)(A), a creditor shall not obtain or use medical information (other than medical information treated in the manner required under section 605(a)(6) of this title) pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit.

(3) Actions authorized by Federal law, insurance activities and regulatory determinations

Section 1681a(d)(3) of this title shall not be construed so as to treat information or any communication of information as a consumer report if the information or communication is disclosed--

(A) in connection with the business of insurance or annuities, including the activities described in section 18B of the model Privacy of Consumer Financial and Health Information Regulation issued by the National Association of Insurance Commissioners (as in effect on January 1, 2003);

(B) for any purpose permitted without authorization under the Standards for Individually Identifiable Health Information promulgated by the Department of Health and Human Services pursuant to the Health Insurance Portability and Accountability Act of 1996, or referred to under section 1179 of such Act, or described in section 6802(e) of this title; or

(C) as otherwise determined to be necessary and appropriate, by regulation or order and subject to paragraph (6), by the Commission, any Federal banking agency or the National Credit Union Administration (with respect to any financial institution subject to the jurisdiction of such agency or Administration under paragraph (1), (2), or (3) of section 1681s(b) of this title, or the applicable State insurance authority (with respect to any person engaged in providing insurance or annuities).

(4) Limitation on redisclosure of medical information

Any person that receives medical information pursuant to paragraph (1) or (3) shall not disclose such information to any other person, except as necessary to carry out the purpose for which the information was initially disclosed, or as otherwise permitted by statute, regulation, or order.

(5) Regulations and effective date for paragraph (2)

(A) Regulations required

Each Federal banking agency and the National Credit Union Administration shall, subject to paragraph (6) and after notice and opportunity for comment, prescribe regulations that permit transactions under paragraph (2) that are

determined to be necessary and appropriate to protect legitimate operational, transactional, risk, consumer, and other needs (and which shall include permitting actions necessary for administrative verification purposes), consistent with the intent of paragraph (2) to restrict the use of medical information for inappropriate purposes.

(B) Final regulations required

The Federal banking agencies and the National Credit Union Administration shall issue the regulations required under subparagraph (A) in final form before the end of the 6-month period beginning on the December 4, 2003.

(6) Coordination with other laws

No provision of this subsection shall be construed as altering, affecting, or superseding the applicability of any other provision of Federal law relating to medical confidentiality.

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(2)

No. 10-251

Supreme Court, U.S.
FILED
SEP - 9 2010
OFFICE OF THE CLERK

In The Supreme Court of the United States

EXPERIAN INFORMATION SOLUTIONS, INC.,

Petitioner,

v.

MARIA E. PINTOS, and
PACIFIC CREDITORS ASSOCIATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT PACIFIC CREDITORS ASSOCIATION'S BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the *Pintos* court's interpretation of 15 U.S.C. § 1681b(a)(3)(A) of the Fair Credit Reporting Act (FCRA) – which precludes a creditor from obtaining legal access to a consumer's credit report during collection unless the consumer *voluntarily initiates the transaction* creating the debt – should be rejected as inconsistent with the language of the statute, its historical interpretation and public policy.

A corollary issue is whether the *Pintos* court's further interpretation of 15 U.S.C. § 1681b(a)(3)(A) as permitting access to the credit report of a judgment debtor is consistent with the court's reasoning that a voluntarily initiated transaction by the debtor is required to obtain a debtor's credit report.

RULE 14.1(b) LIST OF PARTIES

The Petitioner in this Court is Experian Information Solutions, Inc. (hereinafter "Experian"). Petitioner Experian was a defendant, appellee and cross-appellant below.

The Respondent is Maria E. Pintos, who was the plaintiff, appellant and cross-appellee below.

Pacific Creditors Association (hereinafter "PCA") was a defendant and appellee below but is not formally joined as a Petitioner to Experian's Petition for a Writ of Certiorari.

Pursuant to Supreme Court Rule 12.6, PCA proceeds herein as a Respondent, submitting the following brief in support of Experian's Petition for Writ of Certiorari, and otherwise incorporating Petitioner's Petition for Writ of Certiorari and its accompanying Appendix.

RULE 29.6 STATEMENT

PCA, a California corporation, has no parent company, subsidiary, or affiliate that has issued shares to the public. In conformity with Supreme Court Rule 29.6, PCA submits it has no parent company or publicly held company owning 10% or more of the corporation's stock.

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OPINION BELOW

PCA agrees with and incorporates Petitioner Experian's recitation of the applicable Opinions Below.

JURISDICTION

PCA agrees with and incorporates Petitioner Experian's jurisdictional statement. PCA also adds:

Experian filed its Petition for Writ of Certiorari on August 19, 2010 within 90 days of the Ninth Circuit's May 21, 2010 denial of rehearing and rehearing en banc. As such, it was timely filed pursuant to Supreme Court Rule 13.1. Pursuant to Supreme Court Rule 12.6, PCA's Respondent's Brief supporting Petition for a Writ of Certiorari is hereby filed within 20 days of August 20, 2010, the date the instant matter was placed on the Court's docket. *See* Sup. Ct. R. 12.6.

STATUTORY PROVISIONS INVOLVED

PCA agrees with and incorporates Petitioner Experian's recitation of the Statutory Provisions Involved.

PCA submits that the following additional FCRA subsection is also relevant to this Court's consideration of the issues:

15 U.S.C. § 1681a(m) provides:

> The term "credit or insurance transaction that is not initiated by the consumer" does not include the use of a consumer report by a person with which the consumer has an account or insurance policy, for purposes of –
>
> (1) reviewing the account or insurance policy; or
>
> (2) collecting the account.

STATEMENT

1. The Fair Credit Reporting Act (FCRA) was enacted in 1970 to, among other things, "promote efficiency in the Nation's banking system" and, at the same time, to protect "consumer privacy." *See TRW, Inc. v. Andrews*, 534 U.S. 19, 23 (2001). The FCRA permits access to an individual's credit history often compiled over years reflecting the individual's purchases, payment history and other financial and legal transactions. The FCRA, however, regulates access by third parties to the individual's credit information for certain restricted and enumerated purposes set forth at 15 U.S.C. § 1681b, *et seq*. The challenged "permissible purpose" here was PCA's acquisition of Ms. Maria Pintos' credit report to aid in the collection of a deficiency debt owed by Ms. Pintos. Under the FCRA, pulling a credit report without a permissible purpose subjects the party who obtains the report to civil liability in the form of

actual and statutory damages, attorneys fees and costs. 15 U.S.C. §§ 1681b(f), 1681n and 1681o. As a corollary obligation, consumer reporting agencies, such as Experian here, are required to design and maintain reasonable procedures to prevent access to an individual's credit history unless a permissible purpose exists to pull his or her report. *See* 15 U.S.C. § 1681c(a).

2. As noted in Petitioner's briefing, the specific subsection at issue here is 15 U.S.C. § 1681b(a)(3)(A). This subsection permits the "pulling" of an individual's credit report "in connection with a credit transaction involving the consumer" and where the transaction involves or leads to the "collection of an account of the consumer." In 2004 (and indeed even up to today outside of the Ninth Circuit), § 1681b(a)(3)(A) was construed to permit the pulling of a consumer's credit report to aid in the collection of a debt, regardless of whether the transaction giving rise to the debt could be characterized as "voluntary" or "initiated" by the consumer. *See, e.g., Hasbun v. County of Los Angeles*, 323 F.3d 801 (9th Cir. 2003); *accord Phillips v. Grendahl*, 312 F.3d 357, 366 (8th Cir. 2002) (debt collection is a permissible purpose to pull credit report under 1681b(a)(3)(A)); *Lusk v. TRW*, 173 F.3d 429 (6th Cir. 1999) (same – unpublished); *Duncan v. Handmaker*, 149 F.3d 424, 428 (6th Cir. 1998) (same); *Miller v. Wolpoff & Abramson*, 309 F. Appx. 40 (7th Cir. 2009) (same – unpublished); *Dumas v. City of Chicago*, 234 F.3d 1272 (7th Cir. 2000) (same – unpublished).

3. The Federal Trade Commission, the agency tasked with interpreting and enforcing the FCRA, has historically recognized that pursuant to 15 U.S.C. § 1681b(a)(3)(A), a permissible purpose exists to pull a consumer's credit report "for use in attempting to collect that consumer's debt." 16 C.F.R. pt. 600, App. § 604(3)(A), cmt. 1(A) 2002.

4. The basic facts are these: Ms. Pintos parked her unregistered vehicle illegally on a public street in San Bruno, California. Pet. App. 10a. The police department had her vehicle towed and impounded by P&S Towing. Pet. App. 10a. After being given the opportunity, but failing, to reclaim her vehicle by the payment of the towing and storage charges, P&S Towing commercially sold the vehicle pursuant to California Civil Code §§ 3068.1 and 3068.2. Pet. App. 10a. The sale did not fully pay off the charges, and P&S Towing assigned collection of the deficiency debt, owed by Ms. Pintos, to PCA, a debt collection company. Pet. App. 10a. As part of its collection attempt, PCA pulled Ms. Pintos' credit report from Experian on December 5, 2002. Pet. App. 10a.

5. Ms. Pintos brought suit against PCA and Experian on December 4, 2003, on the basis that collection of this debt did not provide a permissible purpose for pulling her credit report. Ms. Pintos alleged that PCA had violated the FCRA by obtaining the report and Experian had violated the FCRA by supplying it. On November 9, 2004, the District Court for the Northern District of California (per Hamilton, J.) granted summary judgment to both PCA and

Experian, finding that debt collection was a permissible purpose under 15 U.S.C. § 1681b(a)(3)(A), relying on, among other authority, the Ninth Circuit's earlier *Hasbun* decision. Pet. App. 72a-75a.

6. Pintos appealed. In its now withdrawn and superseded first opinion, the Ninth Circuit reversed the summary judgment, holding that a consumer's credit report could only be pulled for collection purposes under § 1681b(a)(3)(A) when the debt was the product of an underlying credit transaction in which the debtor voluntarily sought credit. Pet. App. 59a-60a. Because the Ninth Circuit found that the towing deficiency was "involuntary," it held that no credit transaction had occurred and hence, her credit report could not be validly obtained pursuant to § 1681b(a)(3)(A). Pet. App. 60a.

7. Both PCA and Experian petitioned for rehearing and rehearing en banc. After a change in the panel, with Judge Bea replacing Judge Schiavelli, the panel, on April 30, 2009, issued a new decision, again reversing the District Court, but for a different reason. This time, the majority interpreted the language of the statute which provides: "credit transaction involving the consumer" to require a transaction voluntarily *initiated* by the consumer. Pet. App. 38a-39a. Moreover, in an effort to reconcile its earlier *Hasbun* decision (which applied to the collection of a judgment debt) with this new interpretation of the statute, the majority found that the collection of a judgment debt is always a permissible purpose under § 1681b(a)(3)(A). Pet. App. 40a-41a. Judge Bea wrote

a strong dissent, in essence stating that the majority opinion was wrong in its core holding that there was no permissible purpose to pull Ms. Pintos' credit report. Pet. App. 48a-51a. Judge Bea commented on the jurisprudential disarray created by the majority's attempt to reconcile *Hasbun* with its *Pintos* holding. Pet. App. 51a. Judge Bea wrote that there was no textual or other coherent basis for distinguishing the collection of judgment debts – presumably almost always obtained involuntarily through transactions not initiated by the consumer – from the collection of other debts. Pet. App. 51a. Indeed, in the original *Hasbun* decision, the court tethered its conclusion that a permissible purpose existed to the analysis that judgment debts were simply a subset of a larger universe of debts – some voluntarily created, and some not – the collection of which provide a permissible purpose to pull a credit report under 15 U.S.C. § 1681b(a)(3)(A). *Hasbun*, 323 F.3d at 803.

8. Again, PCA and Experian sought rehearing or rehearing en banc. On May 21, 2010, the Ninth Circuit reissued its second decision, with one footnote added wherein the majority provided it had not been "persuaded . . . to change our opinion." Pet. App. 3a, 17a-18a. Judge Bea's dissent remained unchanged.

9. Chief Judge Kozinski, writing for six other dissenting judges (including Judges O'Scannlain, Kleinfeld, Gould, Tallman, Callahan and Bea), argued en banc review should have been granted. Pet. App. 5a. He noted that when the FCRA was construed as a

whole, with § 1681b(a)(3)(A) read in harmony with § 1681a(m) and § 1681b(c), a creditor should be permitted to pull a credit report in connection with collection. This is true, he argued, whether or not the debt-creating transaction was voluntarily "initiated" by the consumer. Pet. App. 7a. He bluntly stated: "In holding otherwise, the majority flunks Statutory Interpretation 101." Pet. App. 8a.

REASONS FOR GRANTING THE PETITION

I. THIS CASE RAISES AN IMPORTANT QUESTION REGARDING THE INTERPRETATION OF THE FCRA AT 15 U.S.C. § 1681b(a)(3)(A) WHICH SHOULD BE RESOLVED BY THIS COURT.

The initial step in statutory construction is to determine "whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997); *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240 (1989).

A corollary canon of statutory interpretation requires that statutes be read as a whole since the meaning of the statutory language, plain or not, necessarily depends on context. *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991). Statutes should normally be construed under the assumption that Congress intended each of the statute's terms to have

significance and import. *See, e.g., United Savings Assn. of Texas v. Timbers of Inwood Forest Assoc., Ltd.*, 484 U.S. 365, 371 (1988) (while a provision may appear ambiguous "in isolation" this ambiguity is "often clarified" by comparing how the same terminology is utilized elsewhere in the statute).

The majority's construction of § 1681b(a)(3)(A), requires the debt to arise from a credit transaction that is voluntarily initiated by the consumer in order to validly pull a credit report for collection purposes. This interpretation is at odds with the above rules of construction as pointed out by Chief Judge Kozinski. In considering § 1681b(a)(3)(A) in isolation, a divided Ninth Circuit panel succumbed to "the unhealthy process of amending the statute by judicial interpretation." *Public Citizen v. U.S. Department of Justice*, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring).

Given the importance of nationwide uniformity in interpreting federal legislation, particularly laws such as § 1681b(a)(3)(A) that are relied upon thousands (and perhaps tens of thousands) of times a day by creditors, this Court's intervention is needed.

A. The Language Of § 1681b(a)(3)(A), Read In Conjunction With § 1681b(c), Forecloses The Majority's Consumer "Initiation" Requirement.

The Ninth Circuit majority held that under the permissible purpose related to collections (subsection

1681b(a)(3)(A)) a "credit transaction involving the consumer" must be *initiated* by the consumer. Pet. App. 15a-16a. A consumer seeking and obtaining a credit card would appear to be a prototypical example of a transaction initiated by the consumer. Here, because Ms. Pintos was found not to have voluntarily "initiated" the circumstances leading to the towing of her vehicle and the resultant debt, the *Pintos* majority concluded that PCA was not legally permitted to access her credit report – even though it was sought in conjunction with the collection of a debt. Pet. App. 14a-15a.

15 U.S.C. § 1681b(a) states in relevant part:

> (a) In general
>
> Subject to subsection (c) of this section, any consumer reporting agency may furnish a consumer report under the following circumstances and no other:
>
> . . .
>
> (3) To a person which it has reason to believe –
>
> (A) intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer. . . .

15 U.S.C. § 1681b(c) provides:

(c) Furnishing reports in connection with credit or insurance transactions that are not initiated by the consumer

(1) In general

A consumer reporting agency may furnish a consumer report relating to any consumer pursuant to subparagraph (A) or (C) of subsection (a)(3) of this section in connection with any credit or insurance transaction that is not initiated by the consumer only if –

(A) the consumer authorizes the agency to provide such report to such person; or

(B)(i) the transaction consists of a firm offer of credit or insurance;

(ii) the consumer reporting agency has complied with subsection (e) of this section; and

(iii) there is no in effect an election by the consumer, made in accordance with subsection (e) of this section, to have the consumer's name and address excluded from lists of names provided by the agency pursuant to this paragraph.

15 U.S.C. § 1681a(m) provides:

The term "credit or insurance transaction that is not initiated by the consumer" does not include the use of a consumer report by a person with which the consumer has an account or insurance policy, for purposes of –

> (1) reviewing the account or insurance policy; or
>
> (2) collecting the account.

Distilled to their relevant essence, 15 U.S.C. §§ 1681b(a), 1681b(c) and 1681a(m) may be diagrammed as follows:

> Any consumer reporting agency may furnish a consumer report:
>
> To a person [that] intends to use that information in connection
>
> [1.] with a credit transaction involving the consumer, and
>
> [2.] involving (a) the extension of credit to, or (b) the review, or (c) collection of an account of the consumer.
>
> If the credit transaction is *not initiated* by the consumer, additional requirements must be met before a credit report may be pulled.
>
> But these limitations on credit transactions "not initiated by the consumer" do not apply when the consumer report is being pulled "by a person with which the consumer has an account for the purpose of collecting [on] the account."

In his dissent to the Ninth Circuit's refusal to hear the matter en banc, Chief Judge Kozinski wrote as follows:

> Putting sections 1681b(a)(3)(A), 1681b(c) and 1681a(m) together, then, it's clear that:

> (1) Consumers can be "involved" in credit transactions under section 1681b(a)(3)(A) that they didn't initiate;
>
> (2) Section 1681b(c) provides certain restrictions on access to reports under section 1681b(a)(3)(A) when the consumer didn't initiate the transaction; and
>
> (3) Those limitations don't apply here because section 1681a(m) says that Pintos initiated the transaction.

Pet. App. 7a (paragraphs and spacing added).

Chief Judge Kozinski carefully articulated where he believed the majority's analysis went wrong:

> The [majority's mistake] is plain. If subparagraph A of a statute said "all fruit shall be inspected before it can be put into a dessert," and subparagraph B said "in the case of tomatoes inspected under subparagraph A, authorities shall perform extra special inspections," we'd know that subparagraph A covers tomatoes. Section 1681b(c) provides special limits on access to credit reports sought under section 1681b(a)(3)(A) when transactions aren't initiated by consumers. We therefore know that section 1681b(a)(3)(A) covers transactions not initiated by consumers. . . .

Pet. App. 7a.

The *Pintos* majority relied on *Andrews v. TRW, Inc.*, 225 F.3d 1063, 1067 (9th Cir. 2000), *rev'd on other grounds, TRW, Inc. v. Andrews*, 534 U.S. 19 (2001), for reading an "initiated by" requirement into § 1681b(a)(3)(A). (Pet. App. 13a-14a.) But *Andrews* never uses the word initiated.[1]

Instead, the *Andrews* court looked to the dictionary for definitions of "involve" and chose the definition "to draw in as a participant." *Andrews,* 225 F.3d at 1067. Relying on this definition, the court concluded that a victim of identity theft could not be deemed "involved" in the transaction. *Id.* at 1067.

Here, PCA respectfully submits the panel majority's leap from "to draw in as a participant" to "initiated by" is unsupportable. If one is *drawn in* as a participant against their will – it necessarily follows that they did not initiate the transaction. Indeed, in his dissent, Judge Bea persuasively distinguishes the instant case from the situation presented in *Andrews.* Pet. App. 26a.

Judge Bea emphasizes that under the circumstances of the facts at bar Ms. Pintos was truly "involved" in the debt-creating transaction and, indeed, may even be viewed as having "initiated" the transaction.

---

[1] It appears that the "initiated by" language is taken from the Seventh Circuit opinion *Stergiopoulos, et al. v. First Midwest Bancorp, Inc.*, 427 F.3d 1043, 1047 (7th Cir. 2005).

> Pintos, . . . was no innocent bystander in the chain of events that resulted in her debt to P&S Towing ("P&S"). Pintos chose – for two consecutive years – not to pay the automobile registration fees required by California law. Pintos chose instead to break the law by driving her car on expired tags. *See* Cal. Veh. Code § 4000(a)(1) ("No person shall drive, move, or leave standing upon a highway . . . any motor vehicle . . . unless it is registered and the appropriate fees have been paid. . . ."); *see also id.* § 42001.8 (making it an infraction to violate § 4000).
>
> *Pintos chose to leave her car* on a public street, subjecting it to towing. *See id.* § 22651(o)(1)(A) (permitting law enforcement to tow a car whose registration is six months overdue). And *Pintos chose not to pay* the fees assessed by P&S or retrieve her car in a timely manner, resulting in the lien sale and deficiency claim. *See* Cal. Civil Code §§ 3068.1, 3068.2 (providing that a towing company has a lien dependent upon possession and a deficiency claim for unpaid towing charges).

Pet. App. 26a (emphasis added).

In light of the above, Judge Bea concludes,

> With all respect both to Pintos and the majority, refusing to pay required vehicle registration fees and parking one's car on a public street *is* asking to have one's car towed.

Id.

Judge Bea's dissent illustrates Ms. Pinto's involvement in a requisite transaction – even if she did not initiate it – for purposes of collection, thereby avoiding § 1681b(c) restrictions and, instead, falling under § 1681b(a)(3)(A).

B. Section 1681a(m)'s Exclusion Of Debt Collection From Non-Consumer Initiated Transactions Further Undermines The Majority's Interpretation Of § 1681b(a)(3)(A).

The majority's interpretation of the statute also fails to reconcile § 1681b(a)(3)(A) and § 1681b(c) with § 1681a(m).

Section 1681a(m), subtitled "Credit or Insurance Transaction That Is Not Initiated by the Consumer" defines "credit . . . transaction that is *not initiated* by the consumer." (Emphasis added.) That definition specifically excludes from its coverage "the use of a consumer report by a person with which the consumer has an account . . . for purposes of . . . collecting the account." 15 U.S.C. § 1681a(m).

Chief Judge Kozinski switched his analogy from fruit to sports to illustrate the panel's error:

> [I]f a statute expressly excluded golf from its definition of "fun sports," we couldn't hold that golf is a fun sport. Section 1681a(m) expressly excludes debt collection transactions from its definition of non-consumer initiated transactions. We therefore can't say

> that a debt collection transaction was non-consumer-initiated.

Pet. App. 7a.

In other words, debt collection activity is an exception to, or exempt from, any "consumer initiated" requirement for obtaining a credit report.

C. The Majority's Interpretation Also Seemingly Ignores The Plain Language Of Yet A Third FCRA Subsection – § 1681b(a)(3)(F)(i).

15 U.S.C. § 1681b(a)(3)(F)(i) sets forth a separate "permissible purpose" for pulling a credit report – a "legitimate business need."

Notably, one way a party may legitimately obtain a credit report under this separate subsection is when the party "otherwise has a legitimate business need for the information – (i) in connection with a business transaction that is *initiated by the consumer* . . . " 15 U.S.C. § 1681b(a)(3)(F) (emphasis added).

Section 1681b(a)(3)(F) confirms that when Congress wants to impose an "initiated by" requirement before a person may pull the credit report of another, it knows how to do so. Therefore, the use of the word "involving" in § 1681b(a)(3)(A) must mean something different than "initiated by." *United Savings Assn. of Texas v. Timbers of Inwood Forest Assoc., Ltd.*, 484 U.S. at 371 (1988) (while a provision may appear ambiguous "in isolation" this ambiguity is "often

clarified" by comparing how the same terminology is utilized elsewhere in the statute). Of course there is no reason why it must mean anything more than "involving."

II. THIS CASE HAS SIGNIFICANCE BEYOND THE NEED TO CORRECT THE NINTH CIRCUIT'S STATUTORY MISINTERPRETATION.

Unquestionably, access to consumer credit reports has assumed a vital role in our modern economy. The Ninth Circuit opinion, however, will create uncertainty as to what constitutes a "permissible purpose" under the FCRA in the context of creditor, financial institution and debt collection efforts to collect on overdue debt.

A. Intervention By This Court Is Important To Prevent Transactional Uncertainty To Creditors And Debt Collectors Who Rely On Credit Reports During The Collection/Repayment Process.

The Ninth Circuit opinion eliminates (in the states of the Ninth Circuit) the well established practice by creditors who heretofore had understood that debt collection – *without determination or consideration of the nature of the debt* – provided a permissible purpose for accessing credit reports under § 1681b(a)(3)(A) of the FCRA.

Admittedly, this understanding probably arose from a reading of § 1681b(a)(3)(A) that focused on the "collection of an account" language as opposed to the first part of the sentence which states "in connection with a credit transaction involving the consumer." *See, e.g.*, *Hasbun*, 323 F.3d at 803; *Duncan*, 149 F.3d at 427-28. But, the Ninth Circuit analysis here raises more questions than answers concerning the propriety of when one may obtain the credit report of an individual to aid in the collection of debt.

When, for example, under the lower court's interpretation can a consumer be said to "initiate" a debt? Does the collection of bounced checks or other similar instruments provide a permissible purpose? Is bouncing a check a credit transaction? In California, the writing of a check is not considered a credit transaction (unless post-dated) and is instead akin to money.[2] *Abels v. JBC Legal Group, P.C.*, 428 F.Supp.2d 1023, 1026 (N.D. Cal. 2005).

Does the collection of a medical bill provide a permissible purpose? Presumably it would in the normal course of a patient coming to a doctor for services and subsequently being billed for those services. But what if the services are provided to the patient on an emergency basis? Does a consumer "initiate" a credit transaction by becoming so ill or

---

[2] The FTC, however, has opined that collection of a bounced check is a permissible purpose under 15 U.S.C. § 1681b(a)(3)(A). 16 C.F.R. pt. 600, App. § 604(3)(A) cmt. 9 (2002).

injured that he must be taken to an emergency room by an ambulance? If, so, at what point in time does "initiation" occur, and how? And how does the Ninth Circuit imposed "initiation" requirement mesh with the actual statutory language indicating that a consumer should merely be "involved" in the transaction giving rise to the debt?

How about the collection of penalties, fines or taxes? Would these debts, that on their face appear involuntary, provide the creditor, or a debt collector acting on its behalf, with a permissible purpose for obtaining a credit report? Under the majority's decision, only if these involuntary debts are reduced to a judgment would an impermissible purpose be transmogrified into a permissible one under § 1681b(a)(3)(A).

In contrast, if each of these hypothetical situations simply is examined to determine whether they each "involve" the debtor, the answer is an unambiguous "yes."

The confusion and uncertainty generated by this decision surely will affect the national economy. Even setting aside creditors' vital interests in using credit reports as part of their collection efforts, the debt collection industry specifically benefits the economy by recovering "billions of dollars in delinquent debt each year that would otherwise go uncollected." PricewaterhouseCoopers, *Value of Third-Party Debt Collection to the U.S. Economy in 2007: Survey and Analysis*, June 12, 2008, found online at http://www.

acainternational.org/files.aspx?p=images/12546/pwc2007-final.pdf.[3]

The benefits of third-party debt collection, generally, are realized through reduced consumer prices and greater consumer purchasing power. *Id.* Indeed, consumers would face higher prices were it not for the debt collection industry's ability to recoup losses. *Id.* at p. iii.

Judge Gould made this point in his dissent from denial of rehearing en banc. As he recognized, unnecessarily restricting the use of credit reports in the collection process makes debt collection more difficult, and more expensive. Pet. App. 8a. Judge Gould correctly and logically inferred that this increased cost will ultimately be passed on to consumers.

Credit reports are a crucial tool used by creditors to, among other things: locate debtors, assess the collectability of an account and in working with debtors to help find a means for repayment. Credit reports not only help in providing address and telephone information of debtors, but provide

---

[3] To assist in quantifying the enormous value of third-party debt collection to the U.S. economy, ACA International (American Collectors Association) – a trade organization that represents over 5,500 members worldwide in the credit collection industry) retained PricewaterhouseCoopers LLP to conduct a survey and economic analysis of third-party debt. The survey, entitled *Value of Third-Party Debt Collection to the U.S. Economy in 2007: Survey and Analysis*, performed in 2008, is alluded to herein to illustrate the "real life" impact of the debt collection industry on our national economy.

employment history and information about assets, as well as other debts and obligations.

The majority's opinion here creates confusion and friction in the consumer-credit financial system and will inevitably lead to much higher transactional costs.

B. Intervention By This Court Is Necessary For Uniform Nationwide Interpretation Of The Important Federal Legislation At Issue.

The Ninth Circuit's decision is seemingly at odds with earlier authority within the Ninth Circuit itself and seemingly conflicts with other Circuit Court opinions as well. It is also undermined by the FTC's historical interpretation.

1. The Majority Opinion Conflicts With Another Ninth Circuit Decision – *Hasbun v. County Of Los Angeles*, 323 F.3d 801 (9th Cir. 2003).

In *Hasbun*, 323 F.3d at 801, the Ninth Circuit found that a creditor possessed a permissible purpose to obtain a credit report under § 1681b(a)(3)(A) when attempting to collect court-ordered child support. The Court reached this conclusion by reasoning that "like other creditors, judgment creditors may utilize § 1681b(a)(3)(A) to access consumer reports." *Id.* at 803. *Hasbun* relied on the following relevant FTC commentary:

> A judgment creditor has a permissible purpose to receive a consumer report on the judgment debtor for use in connection with the collection of a judgment debt, because it is in the same position as any creditor attempting to collect a debt from a consumer who is subject of a consumer report.

Id. at 803.

Simply put, the holding in *Hasbun* was that a judgment creditor may obtain a consumer's credit report to collect a judgment because the "collection of an account" equals "collection of a debt," and a judgment creditor logically stands in no different position than any other creditor who is attempting to collect a debt. *Id.* at 803.

In reaching its determination, the Ninth Circuit approved the generally accepted interpretation of § 1681b(a)(3)(A) to allow creditors, as well as debt collectors, to access consumers' credit reports in connection with the collection of a debt.

> . . . [T]he limited case law addressing this issue has uniformly held that creditors have a permissible purpose in receiving a consumer report to assist them in collection of a debt. In other words, collection of a debt is considered to be the "collection of an account."

Hasbun, 323 F.3d at 803, *citing Duncan v. Handmaker,* 149 F.3d at 428; *Edge v. Professional Claims Bureau, Inc.,* 64 F.Supp.2d 115, 118 (E.D.N.Y. 1999);

and *Korotki v. Attorney Serv. Corp., Inc.*, 931 F.Supp. 1269, 1277 (D.Md.1996).

The *Pintos* majority opinion conflicts with and undermines the reasoning of *Hasbun*. It imposes the requirement that in order for the creditor to pull a credit report, the debt must arise out of a voluntary credit transaction *initiated by* the consumer. Pet. App. 15a.

But *Hasbun* involved a judgment for the payment of back child support obligations. There was *no* credit transaction involved. Certainly, it could *not* be said that Hasbun sought out credit, much less "initiated" any credit transaction. Imposition of the judgment was not voluntary. Thus, under the *Pintos* majority's decision, the new "consumer initiation" requirement, meant that the government officials who had obtained Mr. Hasbun's credit report could not have possessed a permissible purpose.

The majority attempted to resolve this conflict in its analysis by distinguishing *Hasbun* on the grounds that *Hasbun* involved a judgment. Pet. App. 17a. Hence, the majority's caveat that the "consumer initiation" requirement applies to the collection of all debts except those that have been reduced to judgment. *Id.* The question is why?

Nowhere in § 1681b(a)(3)(A), or anywhere else in the FCRA, does the plain language of the statute make an exception for debts reduced to judgment. This exception was apparently created by the *Pintos*

panel majority in order to avoid expressly overruling *Hasbun*, but the conclusion finds no textual support.

The *Pintos* majority's rationale is that judicially established debts "involve" the debtor by operation of law. Pet. App. 17a. However, as pointed out by Judge Bea in his dissent, the deficiency balance owed by Ms. Pintos was also created by "operation of law" under California statutes. *See* Pet. App. 27a-29a. If § 1681b(a)(3)(A) allows a judgment creditor to obtain a credit report in order to aid in the collection of a debt established by law, why does it not logically follow that § 1681b(a)(3)(A) allows a statutory creditor to obtain a credit report in order to aid in the collection of a statutorily established debt, such as that owed by Ms. Pintos?

The court in *Hasbun* held that the collection of judgment debt provided a permissible purpose because a judgment debt was a subset of all debts and debt collection was a permissible purpose under § 1681b(a)(3)(A). However, by untethering *Hasbun* from debt collection generally, it loses all ties to the statutory language. Section 1681b(a)(3)(A) makes no reference to the collection of judgments.

2. The Majority Opinion Departs From The Interpretation Of § 1681b(a)(3)(A) By Other Circuits.

As set forth in Experian's Petition, published and unpublished decisions from other United States

Circuit Courts support the long established understanding that debt collection alone provides a permissible purpose for the pulling of the consumer debtor's credit report, whether or not the debt-creating transaction is initiated by the consumer. Pet. 16-17. Failure to reconcile these cases and to establish a nationwide interpretation of the statute will lead, PCA submits, to any number of unwelcome, mischievous consequences.

For example, the *Pintos* rule places a heavy burden on creditors and debt collection agencies that operate nationwide. Although operating under the same federal statute, the creditors and debt collectors will have to abide by different constructions of the exact same rule depending on the jurisdictions in which they are operating. There will be no uniformity.

Creditors and debt collection agencies operating in the Ninth Circuit will be competitively disadvantaged economically as creditors and debt collectors operating in other jurisdictions will be playing by different, less restrictive, and less expensive, rules.

Consumers with claims, or potential claims, under the FCRA may be encouraged to forum shop to file suit in the most advantageous jurisdiction.

And courts inevitably will be required to resolve questions such as which law applies when a creditor located in the Sixth Circuit obtains a credit report from a credit reporting agency located in the Seventh Circuit pertaining to a consumer that lives in the Ninth Circuit.

PCA submits review (and hopefully reversal) is necessary to avoid such unnecessary complications, uncertainty and potentially unwarranted consequences.

3. The Majority Opinion Departs From The FTC's Interpretation Of § 1681b(a)(3)(A).

As set forth in detail in Experian's Petition, the panel's decision also seemingly conflicts with the FTC's interpretation of § 1681b(a)(3)(A). Pet. 17-18. The FTC is the federal agency charged with enforcement of the FCRA. The FTC's interpretation tends to support the longstanding construal that debt collection provides a permissible purpose to obtain a consumer's credit report. *See* 16 C.F.R. pt. 600, App. § 604(3)(A) cmt. 1 and 2 (2002).

While not binding, the FTC's interpretation of the statute is certainly persuasive and should be given substantial weight. Indeed, with respect to another, related federal statute over which the FTC has authority, reliance on FTC advisory opinions and interpretations is important. *See Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S.Ct. 1605, 1621 and 1625 (2010) (concurring opinion by Justice Breyer) (discussing the federal Fair Debt Collection Practices Act 15 U.S.C. § 1692 *et seq.*).

CONCLUSION

For all of the forgoing reasons, Respondent PCA respectfully supports and joins in Experian's request for the issuance of a Writ of Certiorari. PCA submits that Experian's Petition for a Writ of Certiorari should be granted and the Court of Appeals' judgment summarily reversed, or alternatively, the case should be set for full consideration on the merits.

Respectfully submitted,

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No. 10-251

IN THE

Supreme Court of the United States

EXPERIAN INFORMATION SOLUTIONS, INC.,

Petitioner,

v.

MARIA E. PINTOS and PACIFIC CREDITORS ASSOCIATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENT MARIA E. PINTOS IN OPPOSITION

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QUESTION PRESENTED

Whether using a credit report to assist in collecting a disputed deficiency claim that did not arise from a "credit transaction" and does not concern an "account" qualifies as a permissible purpose within the meaning of the Fair Credit Reporting Act, 15 U.S.C. § 1681b(a)(3)(A), as it stood prior to its amendment by the Fair and Accurate Credit Transactions Act of 2003.

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STATEMENT OF THE CASE

Police ordered P&S Towing to tow a vehicle registered to respondent Maria Pintos and her son, David. P&S subsequently retained a collection agency, respondent Pacific Creditors Association (PCA), to collect on its asserted towing deficiency claim. PCA obtained Mrs. Pintos's credit report from petitioner Experian Information Solutions (Experian) and told her it would ruin her credit unless she paid the claim. PCA did not have a "permissible purpose" under the Fair Credit Reporting Act (FCRA or the Act), 15 U.S.C. §§ 1681 *et seq.* (2000), for obtaining her credit report.

1. Consumer reports, commonly referred to as "credit reports," contain information that "bear[s] on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living." 15 U.S.C. § 1681a(d)(1). They include detailed personal information such as a person's social security number, date of birth, current and former addresses, and names used (which may reveal a person's marital history). They also include detailed financial information: the businesses with which an individual has accounts, the account numbers, credit limits, available credit, payment history, bankruptcy status, charge-offs, repossessions, foreclosures, and judgments. *See generally* Craig Ball, *Cybersleuthing for People Who Still Can't Program Their VCRs*, GPSolo, June 2003, at 40 (listing information commonly found in credit reports).

Because this information is so sensitive, Congress decided that "[t]here is a need to insure that

consumer reporting agencies exercise their grave responsibilities with . . . respect for the consumer's right to privacy." 15 U.S.C. § 1681(a)(4). Accordingly, FCRA requires the agencies that compile and maintain credit reports to keep them confidential. *Id.* § 1681b(a).

To enforce its privacy objective, the Act establishes a private right of action against any party who obtains a credit report without a "permissible purpose." 15 U.S.C. §§ 1681b(f), 1681n(a), 1681o(a). It also requires "[e]very consumer reporting agency [to] maintain reasonable procedures designed . . . to limit the furnishing of consumer reports to the purposes listed under section 1681b," and makes any consumer reporting agency liable for furnishing a report "if it has reasonable grounds for believing that the consumer report will not be used for a purpose listed in section 1681b of this title." 15 U.S.C. § 1681e(a).

2. Petitioner Experian is one of three national consumer reporting agencies. These agencies compile consumer data into credit reports. Experian enters into agreements with businesses that provide Experian with detailed information about the consumers with whom they transact. As subscribers, these businesses are able to access consumers' credit reports online by entering known information – often a name and little else. Respondent PCA is an Experian subscriber.

3. In 1999, respondent Maria Pintos bought a thirteen-year-old Chevrolet Suburban for her son

David and signed the title over to him. ER 133, 135 (PCA).[1] She never drove the vehicle because it was a stick shift, which she did not know how to operate. ER 133 (PCA). In May 2002, local police directed P&S to tow the vehicle because it was parked on a public street with expired tags. ER 155 (PCA).

Neither Mrs. Pintos nor her son reclaimed the vehicle. P&S subsequently mailed Mrs. Pintos a notice informing her that the vehicle would be sold. ER 155 (PCA). California law permitted P&S to sell the vehicle and required it to apply the proceeds to the towing and storage charges. P&S asserted a deficiency claim of $1900 and hired respondent PCA – a collection agency that specializes in collecting towing debts – to collect that amount, plus interest.[2] *See* ER 128 (Experian).

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[1] Citations to "ER [page number] (PCA)" refer to pages in the record excerpts filed by respondent PCA in the court of appeals. Citations to "ER [page number] (Experian)" refer to page numbers in the record excerpts filed by petitioner Experian. Citations to "ER [page number] (Pintos)" refer to page numbers in the record excerpts filed by Mrs. Pintos. Citations to "Supplemental ER [page number] (Pintos)" refer to page numbers in the supplemental record excerpts filed under seal by Mrs. Pintos.

[2] Mrs. Pintos disputes P&S's towing deficiency claim. P&S's actions were governed by California Civil Code Sections 3067-3074. By towing a vehicle, a towing company obtains a possessory lien. It is entitled, if the owner does not reclaim the vehicle, to sell it "in a commercially reasonable manner." Cal. Civ. Code § 3072(i). If the sale price does not cover the charges for towing, storage, and conducting the sale, the company obtains a deficiency claim. But if it knowingly violates any part

In October 2002, PCA sent Mrs. Pintos a letter demanding that she "mail or bring this notice to our office with full payment." ER 128 (Experian). About a month later, when PCA had not received "full payment," it pulled Mrs. Pintos's credit report from Experian and called her at work, explaining that her report showed she had good credit, which would be ruined unless she paid its demand.

4. In 2003, Mrs. Pintos filed suit in the United States District Court for the Northern District of California. She alleged that PCA had violated FCRA by obtaining her credit report without a permissible purpose and that Experian had violated the Act by releasing the report. The defendants separately moved for summary judgment, each arguing that PCA had a permissible purpose for requesting the report under Section 1681b(a)(3)(A), which provides, in pertinent part, that reports can be provided to a person who

> intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of

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of the statutory scheme, the company "forfeit[s] all claims." *Id.* § 3070(c), (d).

P&S asserts a deficiency claim that is precisely the full amount of its towing, storage, and sale charges. Thus, either P&S did not apply the proceeds of sale to those charges or it did not sell the vehicle in a "commercially reasonable manner." Either way, its deficiency claim – which it has never attempted to prove in court – is invalid.

> credit to, or review or collection of an account of, the consumer.

Mrs. Pintos responded that PCA had failed to satisfy the section in two respects – either of which was sufficient to violate FCRA and to allow her suit to go forward. First, PCA's request did not occur "in connection with a credit transaction" because any amount to which PCA was entitled was unrelated to credit. *See* ER 185-87 (PCA). Second, PCA's desire for payment did not arise out of a "pre-established credit account," ER 187 (PCA).

The district court granted summary judgment to both defendants. It found that "settled law in the Ninth Circuit" foreclosed Mrs. Pintos's argument that PCA lacked a permissible purpose under Section 1681b(a)(3)(A). Pet. App. 74a. The decision to which it pointed was *Hasbun v. County of Los Angeles*, 323 F.3d 801 (9th Cir. 2003), which concerned the collection of a child support judgment. The Ninth Circuit had found that the county was entitled to obtain Hasbun's credit report because "judgment creditors may utilize § 1681b(a)(3)(A) to access consumer reports." 323 F.3d at 803. In the course of reaching the conclusion that the county was attempting to collect an account within the meaning of Section 1681b(a)(3)(A), the court had remarked that "[i]n other words, collection of a debt is considered to be the 'collection of an account.'" 323 F.3d at 803.

Relying on that remark from *Hasbun*, the district court in this case held that PCA also had a permissible purpose for obtaining Mrs. Pintos's credit report because it too was trying to collect a debt. Pet.

App. 75a. Having reached that conclusion, the district court declined to reach the question whether Experian would have been liable under Section 1681e for negligently releasing Mrs. Pintos's credit report "if PCA had not had a permissible purpose." *Id.*

5. Mrs. Pintos appealed.[3] In 2007, the Ninth Circuit reversed the district court's grant of summary judgment and remanded for further proceedings. The court explained that "Section 1681b(a)(3)(A) does not provide that *all* 'account collection' is a permissible purpose for obtaining credit reports." Pet App. 58a (emphasis added). Rather, the statute authorizes the release of credit reports only "in connection with a credit transaction involving the consumer . . . *and* involving the . . . review or collection of an account." *Id.* (quoting 15 U.S.C. § 1681b(a)(3)(A) (emphasis and ellipses in original)).

Turning to the question of what constitutes a "credit transaction," the court observed that FCRA "initially did not define the term 'credit,'" Pet. App. 58a, but that the Fair and Accurate Credit Transactions Act of 2003 (FACTA), Pub. L. 108-159, 117 Stat. 1952, had expressly incorporated into FCRA the pre-existing definition of "credit" provided by the Equal Credit Opportunity Act (ECOA), 15 U.S.C. §§ 1691 *et seq.* (2000). *See* Pet. App. 58a-59a.

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[3] Experian cross-appealed from the district court's order denying its motion to seal certain documents Mrs. Pintos had attached to her cross-motion for summary judgment on the question of Experian's negligence. *See* Pet. App. 56a. The issues raised by the cross-appeal are independent of the issues before this Court.

ECOA defined "credit" as a "right . . . to defer payment." 15 U.S.C. § 1691a(d). In light of that definition, the court of appeals explained that "[n]ot all 'debt' involves a 'credit transaction.'" Pet. App. 58a, 59a. Some debts arise from circumstances other than those in which the debtor sought a right to defer payment for goods or services.

In Mrs. Pintos's case, the panel found that there had been no "'credit transaction' within the meaning of § 1681b(a)(3)(A)" because she "did not voluntarily seek credit." Pet. App. 60a, 59a. "PCA obtained Pintos's credit report for debt collection efforts unrelated to a proper credit transaction." Pet. App. 61a-62a.

The panel recognized that the district court's ruling to the contrary had relied on *Hasbun* and had applied a reading of *Hasbun* that was "not unreasonable at the time." Pet. App. 60a. But the court suggested that *Hasbun*'s expansive view of the permissible purpose provision should be "reevaluated" in light of FACTA. *Id.* Whatever the language in *Hasbun* may have suggested, the text of Section 1681b(a)(3)(A) permitted obtaining credit reports only for debts incurred "'in connection with a credit transaction involving the consumer.'" Pet. App. 58a (quoting the statute). Attempts to collect debts not arising from credit transactions fell outside its scope. *Id.*

6. Experian moved for rehearing and rehearing en banc, citing (as one ground) the panel's reliance on FACTA, which post-dated the events in question, as a reason for declining to find *Hasbun* controlling. *See* Cross-Appellant/Appellee's Petition for Panel

Rehearing and Rehearing en Banc at 6-7, Oct. 12, 2007. In light of that motion, the panel withdrew its initial opinion and issued a superseding opinion. Pet. App. 32a.

The second panel[4] again began its analysis with the text of Section 1681b(a)(3)(A). It pointed to the two requirements contained in that section. The incident giving rise to the request for a credit report "must both (1) be 'a credit transaction involving the consumer on whom the information is to be furnished' and (2) involve 'the extension of credit to, or review or collection of an account of, the consumer.'" Pet. App. 37a. The panel noted that the district court had looked only at the second of the two prerequisites – namely, that PCA was trying to collect "an account." But the district court "did not address" "whether the transaction was 'a credit transaction involving' Pintos." *Id.*

Turning to that question, the panel found that Mrs. Pintos's interaction with PCA did not involve a "credit transaction." In this case, "Pintos did not participate in seeking credit from the towing company." Pet. App. 38a. Rather, the towing company simply towed the car and then sought payment for the charges. Just because Mrs. Pintos "did something that arguably led to the creditor's claim," Pet. App. 39a, did not mean she had entered into a credit transaction. The panel found *Hasbun*

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[4] Judge Bea was assigned to the second panel after one of the judges on the initial panel resigned from the bench. *See* Pet. App. 31a n.*.

inapposite because that case involved "a *judgment* creditor" and "*court-ordered* child support," Pet. App. 40a (emphases in original). "Application of *Hasbun* to permit a credit report to be obtained to assist the collection of a claim that had not yet been adjudicated is not supported by the logic of that decision nor by our other precedents." Pet. App. 41a.

Since there had been no credit transaction in Mrs. Pintos's case, Section 1681b(a)(3)(A) "did not authorize PCA to obtain the credit report on Pintos." Pet. App. 41a. The court noted that on remand defendants were free to argue that PCA was authorized to obtain the report "under a different subsection," Pet. App. 41a n.2, as well as that Experian had not been negligent in releasing the report, Pet. App. 41a-43a.

Judge Bea dissented. He agreed with the majority that "the fact Pintos's actions resulted in P&S's claim is, alone, insufficient to justify P&S requesting her credit report." Pet. App. 49a. But, asserting that "[t]he moment P&S towed Pintos's car, P&S became Pintos's creditor,"[5] Judge Bea argued that *Hasbun* entitled P&S "to access Pintos's credit report in order to collect the debt." Pet. App. 50a.

7. Experian and PCA again petitioned for rehearing and rehearing en banc. Although neither Experian nor PCA had raised the issue, "it was suggested" during the course of the Ninth Circuit's consideration of the petitions, that FCRA Sections 1681b(c) and 1681a(m) "might shed light on the

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[5] In fact, California law is more complex. *See supra* note 2.

meaning of" Section 1681b(a)(3)(A).[6] Pet. App. 4a, 17a n.2. Accordingly the court requested supplemental briefing on that issue. After considering the question further, the court issued an order amending footnote 2 of the panel opinion to explain that those sections, "drafted at a different time and aimed at a different situation," Pet. App. 4a, had no bearing on the construction of Section 1681b(a)(3)(A). Pet. App. 3a. It explained that those provisions had been added to the Act in 1996 "to permit lenders and insurance companies to solicit for business" by acquiring prescreened lists of potential customers from credit reporting agencies. Pet. App. 4a. The footnote then observed that "[n]obody contend[ed]" that Mrs. Pintos's situation involved an offer of credit or insurance within the meaning of Section 1681b(c). Pet. App. 4a. The full court denied the petitions for rehearing en banc in an order that provided that "[n]o further petitions for rehearing may be filed." Pet. App. 5a.

Chief Judge Kozinski, joined by six colleagues, dissented from the denial of rehearing en banc. Believing that the panel had held that "a person isn't 'involved' in a credit transaction unless he 'initiates' the transaction," Pet. App. 5a, he argued that such a "holding" could not be squared with the language of Sections 1681b(c) and 1681a(m), Pet. App. 6a.

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[6] Section 1681b(c) addresses the "[f]urnishing [of] reports in connection with credit or insurance transactions that are not initiated by consumer." Section 1681a(m) defines the term "credit or insurance transaction that is not initiated by the consumer."

First, Chief Judge Kozinski thought that Section 1681b(a)(3)(A) applied even in cases where the consumer had not initiated a transaction. He found support for this conclusion in Section 1681b(c)'s special restrictions on the release of credit reports in cases involving "any credit or insurance transaction that is not initiated by the consumer." The lack of similar language in Section 1681b(a)(3)(A) meant that it applied regardless of whether the consumer had "initiate[d] anything." Pet. App. 6a.

Chief Judge Kozinski claimed in the alternative that, as a matter of law, Mrs. Pintos had in fact initiated the transaction at issue here. Section 1681a(m) excludes from the term "credit or insurance transaction that is not initiated by the consumer" the use of a credit report by a business "with which the consumer has an account . . . for purposes of . . . collecting the account." 15 U.S.C. § 1681a(m). Based on this definitional provision, Chief Judge Kozinski asserted that if a business is seeking collection of a debt, this necessarily means that an account *has* been "initiated by the consumer." Pet. App. 7a (stating that "section 1681a(m) says that Pintos initiated the transaction" simply "by owing the debt").

Judge Gould also dissented, arguing that permitting all creditors to obtain credit reports would ultimately benefit consumers. Pet. App. 8a.

REASONS FOR DENYING THE WRIT

Experian's request for summary reversal, Pet. 3, is based on the hope that this Court will eschew any serious analysis of FCRA, its purposes, or the Ninth

Circuit's actual holding in this case. Once one conducts that analysis, however, it becomes clear that this case warrants no further review at all, much less summary reversal. The Ninth Circuit properly rejected Experian's request to deviate from the text of FCRA. Reading Section 1681b(a)(3)(A) to let debt collectors pull credit reports to collect debts that neither arise from a "credit transaction" nor concern "an account" would unjustifiably restrict the scope of FCRA's privacy protections.

In any event, FACTA's enactment limits this case's significance. FACTA confirms that the Ninth Circuit correctly rejected Experian's claims of a permissible purpose.

It likewise becomes plain upon the slightest inspection that there is no conflict between the Ninth Circuit's holding and either the decisions of other courts or the guidance provided by the Federal Trade Commission (FTC).

I. FCRA Did Not Authorize PCA To Pull Mrs. Pintos's Credit Report.

A. PCA Satisfied Neither Section 1681b(a)(3)(A)'s Requirement That There Be A "Credit Transaction," Nor Its Requirement That PCA's Conduct Involve "Collection Of An Account."

Statutory interpretation "start[s], as always, with the language of the statute." *Williams v. Taylor*, 529 U.S. 420, 431 (2000) (citing *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989)). FCRA permits a consumer reporting agency to "furnish a consumer report under the following circumstances

and no other." 15 U.S.C. § 1681b(a) (emphasis added). One permissible purpose contained in that list – the only one at issue in this case – is if the user obtains the report

> to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer.

15 U.S.C. § 1681b(a)(3)(A). Accordingly, only if PCA had obtained Mrs. Pintos's credit report *both* (1) "in connection with a credit transaction" *and* (2) for "collection of an account" was its use a "permissible purpose." *Id.*; *see also* Pet. App. 13a (noting that these are separate requirements). In fact, the plain text makes clear that neither requirement was met.

1. This case does not involve a "credit transaction." Federal law has consistently defined "credit" in various contexts as "the right granted by a creditor to a debtor to defer payment of debt or to incur debts and defer its payment or to purchase property or services and defer payment therefor." 15 U.S.C. § 1691a(d) (Equal Credit Opportunity Act); *see also* 15 U.S.C. § 1602(e) (Truth in Lending Act); 12 U.S.C. § 5481(7) (Dodd-Frank Wall Street Reform and Consumer Protection Act); 12 C.F.R. § 202.2(j) (Equal Credit Opportunity Act (Regulation B)). These statutory definitions comport with the ordinary understanding of the term, as referring to an agreement between the parties in which one party provides funds, goods, or services now in return for the other party's promise to pay later. *See, e.g.*, Black's Law Dictionary 424 (9th ed. 2009) (defining

credit as "[t]he availability of funds either from a financial institution or under a letter of credit); Ballentine's Law Dictionary 287 (3d ed. 1969) (defining credit as "[t]he antonym of cash on delivery"). These statutory definitions likewise comport with the standard definition of a consumer-credit transaction as "[a] transaction by which a person receives a loan to buy consumer goods or services." Black's Law Dictionary, *supra*, at 359.

To be sure, at the time of the events giving rise to Mrs. Pintos's lawsuit (that is, prior to the enactment of FACTA), FCRA used the term "credit transaction" without providing an explicit definition. But in the absence of any statutory definition, the "ordinary meaning" applies. *See Hamilton v. Lanning*, 130 S. Ct. 2464, 2471 (2010); *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995) (citing *FDIC v. Meyer*, 510 U.S. 471, 476 (1994)).

Experian has never contended that the towing and storage of the Suburban – or any other event in this case – satisfies the ordinary meaning of a "credit transaction." To the contrary, P&S and PCA always insisted on immediate "full payment." ER 128 (Experian); *see also* ER 155 (PCA). Courts have long held that such circumstances do not involve "credit." *See, e.g., Shaumyan v. Sidetex Co.*, 900 F.2d 16, 19 (2d Cir. 1990) (it would be "indiscriminate" and "inappropriate" in light of ECOA to consider every contract in which "compensation for services is not instantaneous" as involving "credit"); *Hahn v. Hanks Ambulance Serv., Inc.*, 787 F.2d 543, 544 (11th Cir. 1986) (it "is not extending 'credit'" to "assess[] a charge in light of the customer's failure to pay the company at the time the service is performed").

2. Nor did this case involve "collection of an account," which is also required by Section 1681b(a)(3)(A). Like "credit," the term "account" has a longstanding common meaning: an account is "a formal business arrangement providing for regular dealings or services (as banking, advertising, or store credit) and involving the establishment and maintenance of an account." Merriam-Webster's Collegiate Dictionary 11 (Deluxe ed. 1998); *see also* Random House College Dictionary 10 (rev. ed. 1988) (defining "account" in the business, banking, and finance context as "a. an official business relation, as with a bank, store, or stockbroker, allowing a depositor, customer, or client certain banking or credit privileges. b. the money or credit available to such a depositor, customer, or client, as the amount of money deposited in a checking or a savings account at a bank. c. a banking or credit privilege or service extended by a bank, store, or the like, to customers or clients"). An account presupposes a consensual arrangement between the parties, entered into voluntarily.

Experian has never explained how this case involves an "account." To the contrary, Mrs. Pintos had no account with either P&S or PCA: there was no "formal business arrangement," they had no "regular dealings or services," and there was no "establishment" or "maintenance" of any account involved. Instead, the towing claim was a one-time charge imposed unilaterally without Mrs. Pintos's knowledge or consent – a far cry from the traditional understanding of an "account."

3. Furthermore, Experian's interpretation of Section 1681b(a)(3)(A) violates the presumption

against superfluity. FCRA should be interpreted so that "no clause, sentence, or word shall be superfluous." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (citation and internal quotation marks omitted). Courts must "give effect, if possible, to every clause and word of a statute." *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (citation and internal quotation marks omitted). Section 1681b(a)(3)(A) uses two separate phrases – "a credit transaction" *and* "the collection of an account" – to describe the permissible purpose. Experian, however, collapses those two phrases to encompass the same thing – all debt collection. Its interpretation either ignores the conjunctive requirement of the word "and," or it renders the phrase "credit transaction" completely superfluous.

4. Experian not only writes words out of FCRA, it reads in words that simply are not there. Experian claims that FCRA's "permissible purposes include, *inter alia*, credit transactions, *debt collection*, employment, insurance, licensing, credit-risk valuation, business transactions, child support determinations, and court orders." Pet. 3 (emphasis added). Every single phrase in that list appears in some form in Section 1681b(a) *except* "debt collection," which is nowhere to be found.

Instead of dealing with the statutory language of Section 1681b(a)(3)(A), Experian quotes dicta from the Ninth Circuit's opinion in *Hasbun v. County of Los Angeles*, 323 F.3d 801 (9th Cir. 2003), as if it

were the statute.[7] In particular, Experian repeatedly fastens on the idea that "collection of a debt is considered to be the 'collection of an account,'" 323 F.3d at 803. *See, e.g.*, Pet. 5, 10, 16-17. Experian's and PCA's use of *Hasbun*'s dicta, however, incorrectly equates "debt collection" – a nonstatutory phrase – with "collection of an account." The two phrases are not synonymous. Collection of an account does involve collection of a debt, because a debt is "a specific sum of money due by agreement or otherwise." Black's Law Dictionary, *supra*, at 462. But the converse is not true. Not every collection of a debt involves the collection of an account. Many debts exist without any antecedent agreement – fines and tort judgments, for example. Experian thus commits the logical fallacy of composition: it uses the fact that some debts are credit account debts to mistakenly conclude that all debts are credit account debts.

In any event, *Hasbun* itself went beyond the language of Section 1681b(a)(3)(A). FCRA authorizes the use of credit reports for "establishing" and "determining" child-support payments, *see* § 1681b(a)(4)(A), and the Ninth Circuit thought it logical to authorize access to credit reports for

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[7] *Hasbun*'s actual holding has two parts: first, Section 1681b(a)(3)(A) permits "child support enforcement agencies attempting to collect a court-ordered judgment of child support" to access credit reports, 323 F.3d at 802-03; second, "child support enforcement agencies need not comply with the certification requirements of 15 U.S.C. § 1681b(a)(4) when seeking to collect court-ordered child support," 323 F.3d at 802.

"enforcing" such payments as well, *see* 323 F.3d at 805. No such logic applies to this case because Experian points to no statutory anchor in FCRA supplying towing lienholders with special access to credit reports.

Hasbun relied also on FTC commentary suggesting that "judgment creditors" should have access to credit reports. 323 F.3d at 803-04. This case does not involve an adjudicated claim, Pet. App. 17a; indeed, Mrs. Pintos disputes whether she owes P&S any money at all. *See supra* note 2. Experian does not defend *Hasbun*'s initial departure, yet it argues for further departure from the statutory language. This Court should decline Experian's invitation to stray from Congress's carefully considered scheme.

If Congress had wanted to let debt collectors pull credit reports to assist them in collecting on all types of "debt," it knew how to say so. Indeed, Congress has passed an entire statute named for, and directed at, the activity of "debt collection": the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 *et seq.* (2000). In that Act, Congress defined "debt" very broadly to include "any obligation or alleged obligation of a consumer to pay money," *id.* § 1692a(5), but it did this so that consumers would be protected against abusive debt collection practices, regardless of the type of debt, *see id.* § 1692; *see also Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605, 1608 (2010). In contrast, Congress avoided the use of the term "debt" when it enumerated the permissible purposes for which a credit report may be obtained. Section 1681b(a)(3)(A) is drafted much more narrowly because Congress did

not want to authorize collection agencies to examine the credit reports of anyone who is alleged to owe a debt. The debt must arise from "a credit transaction involving the consumer" and "the extension of credit to, or review or collection of an account of, the consumer." 15 U.S.C. § 1681b(a)(3)(A).

B. Experian And PCA's Reliance On FCRA Sections 1681b(c) And 1681a(m) Is Misplaced.

Until quite recently, Experian and PCA "did not appear to view [15 U.S.C. §§ 1681b(c) and 1681a(m)] to be relevant to this case." Pet. App. 3a-4a. But now, clutching at a suggestion in Chief Judge Kozinski's dissent from denial of rehearing en banc, they argue that these sections somehow prove that the Ninth Circuit erred by "holding that § 1681b(a)(3)(A) applies only to a subset of consumer debts, *i.e.*, those resulting from a 'transaction initiated by' the consumer." Pet. 10 (quoting Pet. App. 17a).

In making their argument, Experian and PCA string together phrases from the two sections, and compare that language to phrases cherry-picked from the Ninth Circuit's decision. Their argument fails to withstand scrutiny for three reasons. First, Experian mischaracterizes the Ninth Circuit's holding. Second, Section 1681b(c) is directed at a class of transactions wholly unrelated to debt collection, and thus fails to shed any light on the permissibility of PCA's conduct. Third, Section 1681a(m) is likewise irrelevant to the issue here.

1. Experian mischaracterizes the Ninth Circuit's holding. The Ninth Circuit did not hold that Section

1681b(a)(3)(A) invariably requires that a consumer "initiate the transaction." Its actual holding was that "[b]ecause the current case involves neither a transaction for which Pintos sought credit nor the collection of a judgment debt," PCA lacked a permissible purpose under Section 1681b(a)(3)(A). Pet. App. 9a. The opinion uses the phrase "initiate the transaction" as a way of explaining what the statutory phrase "credit transaction involving the consumer" means, in the same way that it used verbs like "participate" or "sought," Pet. App. 15a, 9a, to explain why unilateral conduct resulting in a demand for immediate payment does not give rise to a permissible purpose under Section 1681b(a)(3)(A). The Ninth Circuit did not substitute the word "initiate" for the statutory language. Its focus was always on what it means for something to be a credit transaction.

2. Having insisted that the key to this case is whether Section 1681b(a)(3)(A) covers any transactions not initiated by a consumer, Experian compounds its error. It points out that Section 1681b(c)(1) identifies a class of cases falling within Section 1681b(a)(3)(A) where the transaction "is not initiated by the consumer." Pet. 11. While Experian implicitly concedes that Section 1681b(c)(1) does not apply here,[8] it contends that because Section

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[8] Experian does not contend that Mrs. Pintos authorized it to provide her report to PCA. *See* 15 U.S.C. § 1681b(c)(1)(A) (providing that reports can be furnished "in connection with any credit or insurance transaction that is not initiated by the consumer" if the consumer agrees to the release). Nor, of course, has it ever suggested that PCA was extending to her "a

1681b(a)(3)(A) covers some situations in which consumers did not initiate a transaction, it must be irrelevant whether Mrs. Pintos initiated a transaction here. *See* Pet. 11-12.

Experian misunderstands the relationship between Section 1681b(a)(3)(A) and Section 1681b(c). Contrary to Experian's reading, Section 1681b(c) provides an exception to the general rule that credit reports are not available under Section 1681b(a)(3)(A) unless the consumer has sought and received credit. Section 1681b(c) permits access to a credit report for a "credit or insurance transaction that is not initiated by the consumer *only if*" either the consumer authorized the agency to provide the report, or "the transaction consists of a firm offer of credit or insurance." *Id.* § 1681b(c)(1)(B)(i) (emphasis added). As the Ninth Circuit correctly explained, Section 1681b(c) is "aimed at a different situation" entirely. Pet. App. 4a. Congress recognized that many consumers might be unaware of the availability of credit or insurance products that would benefit them, so it enacted Section 1681b(c) to accommodate two competing concerns. On the one hand, it wanted to encourage providers of credit services and insurance to make "firm offers" to new customers who would benefit from access to these services. Thus, it authorized access to credit reports

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firm offer of credit or insurance." *See id.* § 1681b(c)(1)(B)(i) (providing that reports can be furnished, under certain circumstances, for such "firm offer[s]"). If this case *were* governed by Section 1681b(c), Experian would lose because it violated that section.

under circumstances where otherwise these providers would lack any authorization given that they had no pre-existing relationship with the potential customers.

On the other hand, Congress recognized that allowing entities with whom a consumer had not entered into a relationship to access credit information about them posed substantial risks. Congress therefore decided to explicitly limit access in non-consumer-initiated pre-screening transactions to circumstances that ensure that the consumer's credit information is indeed being used to make offers of credit. Without such restrictions, the temptation for businesses to peruse consumers' credit reports in the hope that they will find information valuable to the conduct of their business is too great.

Thus, Section 1681b(c) does not suggest that Section 1681b(a)(3)(A) generally permits access to credit reports for collection of debts unconnected to a transaction for which a consumer sought credit. Indeed, it proves exactly the contrary: when Congress wanted to authorize access to a credit report for a non-consumer-initiated transaction, it said so expressly. Even then, the transaction must involve "credit."

3. PCA is likewise incorrect in adopting Chief Judge Kozinski's suggestion that Section 1681a(m) means that any time an individual owes a debt, she necessarily initiated the underlying transaction. *See* PCA Br. 15-16 (citing Pet. App. 7a). Chief Judge Kozinski reached this somewhat startling conclusion in the following way: Section 1681a(m) states that "[t]he term 'credit or insurance transaction that is not

initiated by the consumer' does not include the use of a consumer report by a person with which the consumer has an account . . . for purposes of . . . collecting the account." Chief Judge Kozinski reasoned that this meant that "[b]ecause PCA was collecting Pintos's debt, the transaction here isn't one 'not initiated by the consumer.'" Pet. App. 6a. In short, Chief Judge Kozinski wrote that "section 1681a(m) says that Pintos initiated the transaction." Pet. App. 7a.

Chief Judge Kozinski's entire argument, however, rests on a false premise – namely, that there was an account in the first place. There wasn't. *See supra* page 15. Moreover, Section 1681a(m) is directed entirely at cases falling within Section 1681b(c), which is irrelevant here. Collection of an account never falls within Section 1681b(c).

C. Experian And PCA's Policy Arguments Cannot Justify Departing From The Plain Language Of Section 1681b(a) (3)(A).

Finally, Experian makes a pure policy argument untethered to the statutory language. It asks this Court to allow debt collectors to obtain credit reports because this will help them collect debts. That consideration does not justify overturning the balance that Congress struck. FCRA is not the Debt Collectors' Assistance Act. Congress was concerned in FCRA with protecting the personal information of the millions of Americans who engage in credit transactions.

1. Experian and PCA never explain why debt collectors need information "bearing on a consumer's credit worthiness, credit standing, credit capacity,

character, general reputation, personal characteristics, or mode of living," 15 U.S.C. § 1681a(d)(1), in order to collect debts having nothing to do with credit. Giving access to the detailed personal information in a credit report to a business that does not contemplate providing any future service makes no sense. P&S, for example, clearly saw no need to obtain Mrs. Pintos's credit history before deciding to tow, store, and dispose of the Suburban.

Experian offers a different justification: debt collectors need credit reports "to track down debtors." Pet. 20. But providing sensitive personal and financial information when all the debt collector needs is an address is like using an elephant gun to shoot a flea. And often, as here, the flea is already dead: P&S and PCA had both sent letters to Mrs. Pintos at her home address months before PCA pulled her credit report. ER 155 (PCA), ER 128 (Experian).

In reality, there are two principal ways debt collectors use credit reports, neither of which justifies relaxing FCRA's strict requirements. First, a credit report helps them determine whether the consumer is worth suing, a purpose the FTC (whose commentary Experian otherwise finds persuasive, *see* Pet. 17-19) tied to the presence of a "*credit* account." *See* 16 C.F.R. pt. 600, App. § 604(3)(E) cmt. 4 (2002) (emphasis in original). Second, debt collectors use information from credit reports to tailor their collection strategies, sometimes gaining unwarranted psychological leverage over consumers, as occurred with Mrs. Pintos.

2. Experian's interpretation of the statute would severely undercut the Act's protection of consumer privacy. Under its reading, a huge range of businesses, by merely alleging they are owed money, would be entitled to intimate details about individuals with whom they come in contact. A plaintiff who subscribes to a credit reporting agency, for example, could gain access to information about its adversary's financial situation that could give it an unfair advantage during settlement negotiations. "Information is power, as any good attorney knows," *Duncan v. Handmaker*, 149 F.3d 424, 425 (6th Cir. 1998), but it is not power that Congress conferred under FCRA.

The requirement in Section 1681b(a)(3)(A) that there be an "account" provides a critical safeguard to consumers: it allows consumers to control the universe of persons who might request their credit report by choosing where to establish accounts. Experian would eliminate entirely this control. In light of Congress's clear directive to the contrary, FCRA should not be read to permit this diminution of consumers' privacy.

In the end, the Ninth Circuit's opinion in this case is quite narrow. It casts no doubt on the ability of debt collectors to obtain credit reports when they are seeking to collect on credit cards, mortgages, charge accounts, or other debts incurred as the result of a credit transaction. The Ninth Circuit held only that when they seek to collect debts incurred outside the credit system, they cannot use credit reports to do so. This holding hardly warrants the doomsday rhetoric that Experian, PCA, and their amici deploy.

II. The Question Presented Does Not Warrant This Court's Attention.

For three reasons, this case presents no question of national importance, let alone one requiring "this Court's immediate attention," Pet. 19. First, the events at issue predate FACTA's enactment in 2003, which resolved any existing uncertainty as to whether Section 1681b(a)(3)(A) permits pulling a credit report to collect on debts not involving "credit transactions." Second, the Ninth Circuit's decision has actually produced neither uncertainty nor litigation. To the contrary, Experian's approach would do so. Third, the interlocutory posture of this case counsels against review at this time.

1. Because this case involves a version of FCRA that has been amended, a decision on the merits here would affect virtually no cases. In 2003, FACTA amended FCRA to provide an express definition of the term "credit." FCRA now conclusively provides that debt collection is an impermissible purpose unless the debt arises from a transaction in which the debtor was given "a *right* to defer payment." Pet. 21 (emphasis added); *see* 15 U.S.C. § 1691a(d) ("The term 'credit' means the right granted by a creditor to a debtor to defer payment of debt."). Given the demands by P&S and PCA for immediate full payment, *see supra* page 14, this case would never qualify as a "credit transaction" under the current, post-FACTA version of FCRA.

Experian nonetheless urges this Court to decide the pre-FACTA meaning of "credit transaction." Pet. 6. But by now, there are few if any pre-FACTA cases left to decide. FCRA's statute of limitations is the

earlier of "2 years after the date of discovery" or "5 years after the date on which the violation . . . occurs." 15 U.S.C. § 1681p. Experian and its industry amici provide no data whatsoever on how many cases filed before 2008 – the expiration date for pre-FACTA claims – are still in litigation, let alone whether any of them besides Mrs. Pintos's turn on the meaning of "credit." Going forward, such disputes will not arise regardless of any decision this Court might render. Under these circumstances, construing a prior version of a statute hardly warrants this Court's attention.

If FACTA needs to be construed, this Court should await a case in which the relevant events occurred after FACTA's passage. Experian can hardly argue that this case presents an appropriate vehicle for construing FACTA given its insistence that "the FACTA amendments have no bearing on the question presented in this case" because the events at issue occurred before FACTA was enacted, Pet. 21.

Lest there be any doubt, the recent creation of the Bureau of Consumer Financial Protection further counsels against review. The Bureau was created "to implement and, where applicable, enforce Federal consumer financial law." Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1021, 124 Stat. 1376 (2010). This Court should give the Bureau a chance to sort out the implications of FCRA and FACTA and use its rulemaking authority before the Court wades into this complex statutory realm.

Experian's alternative argument that FACTA "is most naturally read to include the *unilateral* granting of a right to defer payment," Pet. 21, is equally unpersuasive. It cites *Murray v. New Cingular Wireless Services, Inc.*, 523 F.3d 719, 722 (7th Cir. 2008) for the proposition that any "provision of services before payment" involves "credit." Pet. 21. Experian's citation of *Murray* is quite misleading. *Murray* involved pre-screening and firm offers of credit within the meaning of Section 1681b(c). It did not involve the actual performance of a service and subsequent insistence on immediate payment. Surely Experian does not want this case decided on the basis of Section 1681b(c) since it did not comply with those limitations. *See supra* pages 20-22. In any event, that section is inapplicable.

2. Beyond a few citations to self-serving industry publications, *see* Pet. 19, Experian provides no basis for believing that the Ninth Circuit's decision has generated either confusion or litigation. The initial panel decision was issued in 2007. If the decision had dramatically cut back on pre-existing practices, substantial litigation or substantial changes in industry practice would by now be evident, but Experian has shown neither.[9] Indeed, PCA's own counsel published a blog post in 2008 stating that "the near hysteria which the ruling has generated in certain quarters is far out of proportion to the

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[9] There are few citations of *Pintos* by other courts, and to the best of counsel's knowledge, every one refers to the case because of the Ninth Circuit's analysis of when documents should be sealed, rather than for any of its discussion of FCRA.

opinion's actual [e]ffect." *See* Mark E. Ellis, "Life After Pintos," http://www.ellislawgrp.com/article08pintos.html, last visited Dec. 1, 2010. Nothing in PCA's brief to this Court explains this inconsistency.

Although the Ninth Circuit's decision did not create confusion or litigation, adopting Experian's interpretation of Section 1681b(a)(3)(A) would create both. The pre-FACTA version of the Act, as now, contained a bright-line rule: a "consumer reporting agency may furnish a consumer report under the following circumstances *and no other*." 15 U.S.C. § 1681b(a) (emphasis added). But if this Court were to embark on a course of grafting other circumstances onto the statute, all sorts of parties might argue for extra-statutory authorizations. As a result, many consumers would have their sensitive personal information disseminated for reasons courts later hold impermissible. The ensuing litigation would serve no one's interests.

Ironically, Experian's argument in this case conflicts with the explanation of permissible purposes contained in its own policy manual at the time Mrs. Pintos's credit report was pulled. That document does not refer to "debt collection" as a permissible purpose. Supplemental ER 198 (Pintos).[10] Rather, it refers to "credit collection." *Id.* Thus, it is difficult to see why the Ninth Circuit's refusal to permit access

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[10] Although this policy manual was filed under seal, Experian has consented to Mrs. Pintos's quotation of that language here.

to credit reports for cases like Mrs. Pintos's changes the playing field in any way.

Perhaps inspired by a vigorous Ninth Circuit dissent from the denial of rehearing en banc, which is based primarily on arguments Experian never even made to the panel, Experian has decided to lobby this Court for an expansion of its entitlement to release credit reports under FCRA. Experian's desire to sell its credit reports to a larger audience hardly provides an important reason for this Court to grant certiorari.

3. This case is interlocutory for two independent reasons that counsel against review. First, the Ninth Circuit noted that "[o]n remand, [Experian] may argue that PCA was authorized to obtain Pintos's report under a different subsection." Pet. App. 3a. Second, Experian has another potential defense regardless of whether PCA had a permissible purpose; a credit reporting agency is liable under Section 1681e only if it fails to maintain appropriate safeguards to limit the furnishing of credit reports to permissible purposes. The Ninth Circuit held that there were disputed issues of material fact connected with this defense that require additional proceedings. *See* Pet. App. 19a-20a.

This Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Institute v. United States*, 508 U.S. 946, 946 (1993) (opinion of Scalia, J., respecting the denial of the petition for writ of certiorari) (citations omitted). Especially since Experian's statutory arguments are based on how the

various provisions of FCRA fit together, there is no reason for departing from this Court's usual practice.

III. There Is No Conflict Between The Ninth Circuit's Holding In This Case And Any Other Authority.

The Ninth Circuit's decision does not conflict with any decisions of the other courts of appeals or with the FTC's interpretation.

A. There Is No Circuit Conflict.

Experian cannot show that any other court of appeals would have decided this case in its favor.

1. Experian cites three decisions purportedly establishing the principle that "debt collection" is a permissible purpose under Section 1681b(a)(3)(A). With respect to each of these cases, Experian relies on loose language that, understood in context, in no way stands for the proposition that debt collection is always and invariably a permissible purpose. In particular, none of the three decisions held that collection is a permissible purpose for debts like the one at issue here.

Only one of the three cases – *Miller v. Wolpoff & Abramson, LLP*, 309 Fed. Appx. 40 (7th Cir. 2009) – actually concerned collection of a debt at all. The consumer in that case incurred the debt by using his credit card. No one disputes that the use of a credit card involves "credit" or that Section 1681b(a)(3)(A) permits a credit card issuer or its collection agency to pull a cardholder's credit report. But *Miller*'s casual references to the credit card balance as a "debt" say nothing about how the Seventh Circuit would analyze whether a towing charge for which immediate

payment was demanded constitutes a credit transaction.

Phillips v. Grendahl, 312 F.3d 357 (8th Cir. 2002), did not even involve a debt. Rather, the Eighth Circuit was asked to determine what the phrase "consumer report" meant. The court held that the document at issue qualified as a "consumer report" because the credit reporting agency intended to use it "for a statutory purpose" – "debt collection." *Id.* at 366. That holding says nothing about whether collection of any particular debt would be a permissible purpose for obtaining a report.

Duncan v. Handmaker, 149 F.3d 424 (6th Cir. 1998), is even further afield. In earlier litigation, the Duncans had sued the bank that held their mortgage, claiming that it had been negligent during the pre-closing inspection of the property. Hoping to find information that could help them in defending the suit, the bank's lawyers pulled the Duncans' credit report and used information from that report in deposing the Duncans. The Duncans then sued the law firm under FCRA. No party in that case was seeking to collect a debt of any kind. Not only is *Duncan* completely inapposite since the provision at issue there was Section 1681b(a)(3)(E) and not Section 1681b(a)(3)(A), it illustrates precisely why Congress sharply limited the permissible purposes for which credit reports may be used.

2. Experian identifies two cases that it claims conflict with the Ninth Circuit's decision here because they permit using a credit report to collect "debt [that] was incurred involuntarily and was not reduced to judgment." Pet. 17. Both opinions are

unreported and thus cannot supply the basis for a circuit split. Furthermore, they are so lacking in even basic detail that it is virtually impossible to determine whether they conflict with the outcome here. To the extent that any conclusions may be drawn, Experian misconstrues both cases.

Lusk v. TRW, Inc., 173 F.3d 429 (6th Cir. 1999) (unpublished table decision) involved litigation by a tenant against a collection agency that pulled his credit report in connection with "money possibly due [to his] landlord for damage in [his] apartment." *Id.* at *1. At the very least, tenant Lusk had voluntarily entered into a contractual arrangement with his landlord. Moreover, the one-sentence discussion in *Lusk* is so truncated that it is impossible to conclude anything more, including whether the money Lusk possibly owed to his landlord stemmed from any kind of deferred payment agreement. In fact, *Lusk* never quotes, let alone interprets, FCRA's language.

In *Dumas v. City of Chicago*, 234 F.3d 1272 (7th Cir. 2000) (unpublished table decision), the city of Chicago obtained Dumas's credit report because she refused to pay a water bill for her property incurred years before she obtained the building via quitclaim. The court determined that this "collection of an overdue balance" was a permissible purpose under Section 1681b(a)(3)(A). *Id.* at *1. Common experience suggests that where there is a water bill, there is an "account" entered into voluntarily, but no further conclusions can be drawn.

These two unpublished table decisions from ten and twelve years ago, respectively, hardly create a circuit split worthy of review. In the intervening

decade, Congress enacted FACTA, amending FCRA to confirm that "credit" does *not* include debt incurred through transactions such as the one at issue in this case. *See supra* pages 26-28. Thus, even if *Lusk* and *Dumas* were to indicate some limited split of authority, there is substantial reason to believe – in light of FACTA – that the rendering courts would reconsider those decisions.

B. The Ninth Circuit's Decision Does Not Conflict With The Approach Taken By The FTC.

Experian admits that the FTC commentary it cites is not entitled to *Chevron* deference, Pet. 18, but nevertheless asserts that the commentary persuasively "reinforces . . . the erroneous nature of the decision below." Pet. 19. Taken as a whole, however, the FTC commentary is at best ambiguous, and indeed many of its passages fully support the Ninth Circuit's decision in this case.

Experian refers to a statement in the commentary that "'[a] judgment creditor'" may request a credit report in collecting on the judgment "'because it is in the same position as any creditor attempting to collect a debt from a consumer who is the subject of a consumer report.'" Pet. 18 (quoting 16 C.F.R. pt. 600, App. § 604(3)(A) cmt. 2 (2002)) (emphasis omitted). But Experian ignores that the FTC clarified this specific commentary by stating that the "judgment creditor" theory of permissible purpose is unavailable "in the absence of any such 'credit' relationship." ER 35-36 (Pintos). The FTC makes clear that the existence of a creditor does not necessitate the existence of "credit."

Similarly, Experian refers to the commentary's statement that Section 1681b(a)(3)(A) provides a permissible purpose "'to receive a consumer report on a consumer for use in attempting to collect that consumer's debt.'" Pet. 18 (quoting 16 C.F.R. pt. 600, App. § 604(3)(A) cmt. 1 (2002)). It is clear, however, that the FTC considers "credit" to be an integral part of Section 1681b(a)(3)(A)'s requirements. According to its commentary, "[a] party seeking to sue on a *credit* account would have a permissible purpose under section 604(3)(A)." 16 C.F.R. pt. 600, App. § 604(3)(E) cmt. 4 (2002) (emphasis in original). Moreover, the FTC has stated in an opinion letter that Section 1681b(a)(3)(A) does not authorize a residential landlord to obtain a former tenant's credit report in anticipation of litigation: that Section "applies only to the review or collection of a *credit* account, as well as to an extension of credit to a consumer." ER 32 (Pintos) (emphasis in original). If a landlord cannot obtain a tenant's credit report in anticipation of litigation, it is unclear why Experian and PCA think a towing company can obtain a vehicle owner's credit report to enforce a deficiency claim.

The common thread throughout the FTC commentary and opinion letters on this subject is that debt collection is a permissible purpose only when it is collection of a *credit* debt. The FTC's view is thus entirely consistent with the Ninth Circuit's holding in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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December 3, 2010

Supreme Court, U.S.
FILED
DEC 14 2010
OFFICE OF THE CLERK

No. 10-251

IN THE
Supreme Court of the United States

EXPERIAN INFORMATION SOLUTIONS, INC.,
Petitioner,

v.

MARIA E. PINTOS,
Respondent.

On Petition for a Writ of Certiorari To the United States Court of Appeals For the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari, pursuant to Supreme Court Rule 29.6, remains accurate.

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REPLY BRIEF FOR PETITIONER

As the Petition demonstrated, the Ninth Circuit's holding—that "credit transaction[s] involving the consumer" under 15 U.S.C. § 1681b(a)(3)(A) include only transactions that "the consumer *initiate[d]*," Pet. App. 15a-16a (emphasis added)—is squarely contrary to the plain text of the statute, which makes clear that the "credit transaction[s]" in § 1681b(a)(3)(A) include "credit . . . transactions that are not initiated by the consumer." *See* 15 U.S.C. § 1681b(c)(1); Pet. 9-16.

Instead of defending the holding below, Respondent Maria E. Pintos attempts to change the subject, by (1) denying (inaccurately) that the Ninth Circuit so held, and (2) seeking to justify the result below on alternative grounds. This effort to divert attention from the Ninth Circuit's holding is a telling concession that the decision below cannot be defended. The Court should summarily reverse, or, in the alternative, grant certiorari to correct the Ninth Circuit's extreme departure from the text of the Fair Credit Reporting Act (FCRA) and established principles of statutory interpretation.

A. Respondent's Failure To Defend The Decision Below Highlights The Need For Review And Correction

1. As the Petition explained, the Ninth Circuit's holding that a "credit transaction involving the consumer" under § 1681b must be one "the consumer initiate[d]," Pet. App. 15a, is squarely contrary to § 1681b(c)(1), which establishes that § 1681b(a)(3)(A) *does* include "credit . . . transactions that are not initiated by the consumer." *See* Pet. at 9-16. As the dissenting judges rightly pointed out, this

interpretation is so plainly "foreclosed by the plain language of the statute" that it "flunks Statutory Interpretation 101." Pet. App. 5a, 8a (Kozinski, C.J., dissenting from denial of reh'g en banc).

Rather than defend this indefensible holding, Respondent instead pretends—once she finally addresses the Ninth Circuit's holding, on page 19 of the Opposition—that the court below never held that a "credit transaction involving the consumer" under § 1681b requires a consumer-initiated transaction. Opp. 19-20. This is demonstrably wrong: the Ninth Circuit expressly held that—aside from its unexplained exception for judgment debts—there is a "requirement that the consumer initiate the transaction." Pet. App. 15a. And, lest there be any doubt, the panel majority expressly summarized its holding as imposing such a requirement:

> PCA was not a judgment creditor. Its claim against Pintos did not result from a *transaction initiated by* Pintos. *We conclude, therefore*, that § 1681b(a)(3)(A) did not authorize PCA to obtain the credit report on Pintos.

Pet. App. 17a (emphasis added); *see also id.* at 16a ("[T]hat Pintos owned the car that was towed did not mean that she initiated the credit transaction.")

Likewise, the dissent clearly understood the majority as so holding, *see* Pet. App. 5a-6a, and the majority made no claim that its holding was mischaracterized.

Further, Respondent is unable to identify any other ground on which the Ninth Circuit purportedly decided the case. She vaguely asserts that the court's "focus was always on what it means for something to

be a credit transaction," Opp. 20, but points to nothing in the opinion purporting to define "credit transaction" or to decide the case on any such basis. Indeed, the Ninth Circuit took it as a given that there *was* a "credit transaction" when P&S provided towing services before seeking payment, and focused instead on whether Respondent had initiated it. *See, e.g.*, Pet. App. 16a ("[T]hat Pintos owned the car that was towed did not mean that she initiated *the credit transaction*. . . . Pintos was not a 'participant' in *the credit transaction*, but was 'oblige[d] to become associated' with it after her car was towed.") (emphases added) (citations omitted).

In short, Respondent's attempt to deny the square holding below speaks volumes about the magnitude of the Ninth Circuit's error and the need for correction.

2. Respondent has good reason for attempting to rewrite the holding below. As she effectively concedes, Opp. 20-21, the Ninth Circuit's actual holding—that § 1681b(a)(3)(A) requires consumer initiation—cannot be reconciled with the plain text of § 1681b(c), which demonstrates that "credit transactions involving the consumer" under § 1681b(a)(3)(A) include "transactions that are *not* initiated by the consumer." *See* Pet. 9-12; Pet App. 6a-7a (Kozinski, C.J., dissenting from denial of reh'g en banc).

Respondent's only attempt to address the import of § 1681b(c) is insubstantial. She is of course correct that the prescreening requirements of § 1681b(c) do not apply here, Opp. 20—§ 1681a(m)'s exemption of account review and collection confirms that much. But, as pointed out in the Petition (at 12-13)—and

not addressed by Respondent—this misses the point. Section 1681b(c) is relevant not because its provisions apply here—there is no claim of that—but because its text decisively forecloses the Ninth Circuit's reading of § 1681b(a)(3)(A). *See, e.g., Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004). Tellingly, Respondent does not even attempt to explain how § 1681b(a)(3)(A) can possibly be read to require consumer initiation in light of § 1681b(c).

Further, Respondent errs in depicting § 1681b(c) as *creating* a permissible purpose for a narrow set of "non-consumer-initiated transaction[s]." Opp. 22. Section 1681b(c) does not *create* a permissible purpose at all. Instead, it places limits on the provision and use of credit reports obtained under the *existing* permissible purposes of § 1681b(a)(3)(A) or (C) in connection with certain transactions not initiated by the consumer, thereby confirming that—contrary to the Ninth Circuit's holding—§ 1681b(a)(3)(A) does not *itself* require consumer initiation. *See* Pet. 11-12.

3. Respondent completely ignores Petitioner's argument that when Congress wanted to include a consumer-initiation requirement it said so expressly—namely, in § 1681b(a)(3)(F)(i) (limiting "legitimate business need" permissible purpose to "a transaction that is *initiated by* the consumer") (emphasis added). *See* Pet. 14-15. Respondent offers no explanation for how a consumer-initiation requirement can be read into § 1681b(a)(3)(A) where Congress specifically chose not to include one expressly. *See, e.g., Bates v. United States*, 522 U.S. 23, 29-30 (1997).

4. Nor does Respondent attempt any response to Petitioner's demonstration that the Ninth Circuit's reading of § 1681a(b)(3)(A) as requiring consumer-initiated debts is contradicted by its own exception for judgment debts. *See* Pet. 15-16.

In sum, Respondent fails to rebut any of the multiple ways in which Petitioner demonstrated that the decision below flagrantly departs from both the statutory text and binding interpretive principles.

B. Respondent Cannot Salvage The Ninth Circuit's Decision By Resurrecting Alternative Arguments Rejected Below

Respondent seeks to avert review by offering alternative arguments that depart from the holding below. The Ninth Circuit—even as it discarded one rationale for its decision and substituted another—properly declined to adopt these arguments when Respondents proffered them. None of them has merit, and none mitigates the pressing need for this Court's intervention.

1. Respondent contends that this case did not involve a "credit transaction," in that "credit" means the right to defer payment for funds, goods, or services. Opp. 13. Here, she argues, there was no deferral of payment, because the towing company and PCA "insisted on immediate 'full payment.'" Opp. 14. This simply misunderstands the concept of deferred payment. The towing company did not insist on payment before providing its services (or contemporaneously); rather, PCA insisted on full payment only after the fact—the very definition of deferred payment. And the provision of services

without prior or contemporaneous payment is plainly an extension of credit.[1]

Respondent appears to believe that deferred payment for services is not an extension of "credit" when the service provider—having previously provided services—later demands "full payment." *Id.* at 14. She offers no support for such a definition, which, if accepted, would appear to exclude a wide swath of deferred payment arrangements from the definition of "credit."[2] As noted earlier, even the majority below apparently rejected this radically narrow definition and accepted that this case involved a "credit transaction." *See* Pet. App. 16a.

2. Respondent's argument that she did not have an "account" with P&S or PCA because they had not "voluntarily" entered into a "formal business arrangement" and had no "regular dealings or

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[1] The portion of the record Respondent cites as the demand for "immediate 'full payment'" is a collection notice sent by PCA five months after P&S towed her car. ER 128 (Experian). She also points to a notice of pending lien sale sent by P&S more than a week after it provided towing services (which, it is worth noting, did not demand payment). ER 155 (PCA).

[2] The two circuit court decisions that Respondent cites—both interpreting different statutes—are not to the contrary. *Shaumyan v. Sidetex Co.*, 900 F.2d 16 (2d Cir. 1990) dealt with the Equal Credit Opportunity Act and held that a contractor had not extended credit when it received "substantially contemporaneous" payment for its work. *Id.* at 18-19. And *Hahn v. Hank's Ambulance Service, Inc.*, 787 F.2d 543 (11th Cir. 1986) (per curiam), dealt with the Truth-in-Lending Act and held only that a late fee assessed for delinquency when a consumer fails to pay in full at the time the service is performed is not a "finance charge" and does not mean that the company has extended credit. *Id.* at 544.

services," Opp. 15, fares no better. Respondent points to no legal authority for her definition of "account," and, contrary to her assertion, nothing about the dictionary definitions she cites "presupposes a consensual arrangement between the parties, entered into voluntarily." *Id.*

Indeed, cherry-picking the fourth definition of "account" in Merriam-Webster's Collegiate Dictionary (Deluxe ed. 1998), Respondent skips over the more relevant *second* definition: "a: a record of debit and credit entries to cover transactions involving a particular item or a particular person or concern b: a statement of transactions during a fiscal period and the resulting balance." *Id.* at 11. This definition comports with the long-held understanding of both the lower courts and the FTC that "collection of an account" within the meaning of § 1681b(a)(3)(A) includes debt collection. *See, e.g.*, 16 C.F.R. pt. 600, app. § 604(3)(A) cmt. 1(A) (2002); *Hasbun v. Cnty. of Los Angeles*, 323 F.3d 801, 802 (9th Cir. 2003); *Phillips v. Grendahl*, 312 F.3d 357, 367 (8th Cir. 2002).

3. Respondent's alternative interpretations of the Act also fail to account for the use of credit reports to collect judgment debts, which even the Ninth Circuit agrees is a permissible purpose under § 1681b(a)(3)(A). Pet. App. 16a-17a; *see also Hasbun*, 323 F.3d at 803. The FTC has taken the same position. *See* 16 C.F.R. pt. 600, app. § 604(3)(A) cmt. 2. Like the court below, Respondent offers no explanation for how her definitions of "credit transaction" and "account" can coherently *exclude* a debt like the towing charges at issue here, but *include* the same debt once it has been reduced to

judgment. Indeed, she admits that her proffered definition of "collection of an account" would not allow the use of a credit report to assisting in collecting "tort judgments." Opp. 17. But she offers no justification for such a radical departure from the universally accepted "judgment creditor rule."[3]

4. Contrary to Respondent's assertion, Opp. 16, Petitioner's interpretation does not ignore the conjunctive nature of "and" or render "credit transaction" superfluous. Nor would it allow anyone "alleging they are owed money," *id.* at 25—such as a prospective tort plaintiff—to access a consumer's credit report. There is no contention that a mere claim for tort damages would constitute a "credit transaction" or permit access to the consumer's credit report under § 1681b(a)(3)(A). But the provision of goods or services for which payment will be deferred —such as emergency medical services, telephone service, or, as in this case, towing services— constitutes a "credit transaction," whether or not voluntarily initiated by the consumer.[4]

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[3] *See also Baker v. Bronx-Westchester Investigations, Inc.*, 850 F. Supp. 260, 262-63 (S.D.N.Y. 1994).

[4] *See, e.g., Edge v. Prof'l Claims Bureau, Inc.*, 64 F. Supp. 2d 115, 118 (E.D.N.Y. 1999) (unpaid hospital charges stemmed from "credit transaction involving" consumer); *Greenhouse v. TRW, Inc.*, No. 96 Civ. 1495, 1998 WL 61037, at *4 (E.D. La. Feb. 13, 1998) (permissible purpose to collect unpaid medical charges); *Korotki v. Att'y Servs. Corp.*, 931 F. Supp. 1269, 1277 (D. Md. 1996) (permissible purpose to collect noncontractual debt for construction services rendered without payment); *cf. Murray v. New Cingular Wireless Servs., Inc.*, 523 F.3d 719, 722 (7th Cir. 2008) (provision of telephone services prior to payment is credit transaction because "[d]eferred payment is 'credit'").

Respondent's interpretation, by contrast, offers an even more radical narrowing of the FCRA than the Ninth Circuit's holding, fully justifying the concerns raised by Petitioner, PCA, and *amici*. Respondent would limit the permissible use of credit reports to collection of debts such as "credit cards, mortgages, [and] charge accounts," Opp. 25—and would not allow their use for debts incurred through the provision of goods or services prior to payment, or apparently even some "judgments," (despite the well established judgment-creditor rule), *id.* at 17.

5. Such a radical narrowing of § 1681b(a)(3)(A)'s permissible purpose for account collection would hamper legitimate collection efforts and inevitably lead to an increase in the cost of consumer credit. As Judge Gould explained in his dissent: "Uniformity of treatment of creditors is useful and likely leads to lower credit enforcement costs to the benefit ultimately of consumers." Pet App. 8a; *see also* Brief of *Amici Curiae* Consumer Data Industry Association and Chamber of Commerce of the United States 10-16.

C. The Decision Below Conflicts With The Interpretations Of Other Courts And The FTC.

In addition to being manifestly erroneous, the decision below conflicts with the longstanding approach of other courts that have treated debt collection as a permissible purpose, without regard to whether the credit transaction that gave rise to the debt was consumer-initiated. *See* Pet. 16-17 (citing cases).

Further, Respondent does not dispute that the Ninth Circuit's novel consumer-initiation

requirement conflicts with the FTC's interpretative guidance on § 1681b(a)(3)(A), which makes clear that lien creditors, like P&S and PCA, may obtain a credit report to facilitate collection. 16 C.F.R. pt. 600, app. § 604(3)(E) cmt. 4; *see also* Pet. 17-19. Instead, Respondent argues that the FTC's interpretation applies only where the transaction giving rise to the debt involved "credit." Opp. 34-35. But, as demonstrated above—and as the Ninth Circuit's actual holding presumed—the transaction in this case did involve "credit." Respondent offers no explanation for how the FTC's commentary can be squared with the Ninth Circuit's countertextual interpretation.

D. Respondent's Attempt To Minimize The Need For This Court's Intervention Is Mistaken.

1. Respondent's argument that the Fair and Accurate Credit Transactions Act of 2003 (FACTA) amendments obviate the need for this Court's review, Opp. 26-27, is mistaken in two ways. First, FACTA has no bearing on whether the Court should summarily reverse the Ninth Circuit's extreme departure from the statutory text and established rules of statutory interpretation.

Second, as demonstrated in the Petition, the FACTA amendments have no relevance to the proper interpretation of § 1681b(a)(3)(A)—whether before or after FACTA. *See* Pet. 21. Respondent has no response to this demonstration. Indeed, her only argument under FACTA—which adopts a conventional definition of "credit" as a right "to defer payment of debt," 15 U.S.C. § 1691a(d)—is the same flawed argument she makes in the absence of

FACTA: that there was no "credit" granted to Respondent because P&S and PCA demanded "immediate full payment." Opp. 26. This argument, as shown earlier (*supra* at 5-6), misunderstands the concept of deferred payment. And it in no way turns on FACTA. *See also Murray v. New Cingular Wireless Servs., Inc.*, 523 F.3d 719, 722 (7th Cir. 2008) ("Deferred payment is 'credit' as the [FCRA amended by FACTA] uses that word.").

2. Contrary to Respondent's assertion, reversal would not create confusion or encourage other parties to seek "extra-statutory authorizations." Opp. 29. Petitioner's argument is well-grounded in unambiguous and irrefutable statutory text. It is the Ninth Circuit's departure from that text, without so much as an attempt to explain how its consumer-initiation requirement can be squared with § 1681b(c), that will sow confusion and encourage forum shopping. And because so many creditors are exposed to suit in multiple jurisdictions, the decision below, if allowed to stand, will skew decision-making by businesses nationwide.

3. Finally, the Ninth Circuit's reversal of a final judgment in favor of Petitioner and PCA and remand to the district court does not support Respondent's attempt to depict the case as "interlocutory." Opp. at 30-31. This Court routinely hears cases in an identical procedural posture. *See, e.g., United States v. Navajo Nation*, 129 S. Ct. 1547, 1554 (2009); *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 164-65 (2004); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 552-53 (2007). Indeed, in similar circumstances this Court heard *TRW Inc. v. Andrews*, 534 U.S. 19 (2001)—another FCRA case—

even though the Ninth Circuit had reversed and remanded for trial on additional defenses available to the consumer reporting agency.

CONCLUSION

The petition should be granted and the court of appeals' judgment summarily reversed or, in the alternative, the case should be set for full consideration on the merits.

Respectfully submitted,

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No. 10-251

Supreme Court, U.S.
FILED
SEP 20 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

EXPERIAN INFORMATION SOLUTIONS, INC.,

Petitioner,

v.

MARIA E. PINTOS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* CONSUMER DATA INDUSTRY ASSOCIATION AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

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RULE 29.6 STATEMENT

Pursuant to Rule 29.6, the Consumer Data Industry Association provides the following disclosure.

CDIA is a trade association. No publicly held company owns 10% or more of its stock.

The Chamber of Commerce of the United States of America is a not-for-profit corporation. No publicly held company owns 10% or more of the its stock.

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INTEREST OF *AMICI CURIAE* CONSUMER DATA INDUSTRY ASSOCIATION[1] AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

The Consumer Data Industry Association ("CDIA") and the Chamber of Commerce of the United States of America ("Chamber"), submit their brief in support of petitioner, Experian Information Solutions, Inc. (*hereinafter*, "Experian").

CDIA is an international trade association, founded in 1906, and headquartered in Washington, D.C. As part of its mission to support companies offering consumer information reporting services, CDIA establishes industry standards, provides business and professional education for its members, and produces educational materials for consumers describing consumer credit rights and the role of consumer reporting agencies ("CRAs") in the marketplace. CDIA is the largest trade association of its kind

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[1] The parties were notified of CDIA's intention to file this brief within the time provided by Rule 37.2(a). All parties have consented to the filing of this brief and the consent letters have been filed with the Clerk of the Court with this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

in the world. Its membership includes more than 200 consumer credit and other specialized CRAs operating in the United States and throughout the world.

In its more than 100-year existence, CDIA has worked with the United States Congress and the State legislatures to develop laws and regulations governing the collection, use, maintenance, and dissemination of consumer report information. In this role, CDIA participated in the legislative efforts that led to the enactment of the Fair Credit Reporting Act ("FCRA") in 1970 and its subsequent amendments. CDIA also publishes, maintains and updates a manual entitled *How to Comply with the Fair Credit Reporting Act*, which is used by CDIA's members and their clients, the users of consumer reports.

The Chamber is the world's largest not-for-profit business federation, representing 300,000 direct members and indirectly representing the interests of over 3,000,000 businesses and business associations. For almost a century, the Chamber has played a key role in advocating on behalf of its membership. An important function of the Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community.

CDIA's CRA members, and the millions of statutory lien holders and other lien creditors who use consumer reports furnished by CRA, as well as

consumers who are the subjects of those consumer reports, will be harmed by the Ninth Circuit's decision which drastically narrows the scope of the permissible purpose found in the FCRA, 15 U.S.C. § 1681b(a)(3)(A).

CDIA's decades-long central role in the consumer reporting industry, participation in the process leading to the FCRA's enactment and amendments, and participation as an *amicus curiae* in the Ninth Circuit appeal, allows CDIA to aid this Court in its consideration of the important issues raised in Experian's Petition for Writ of *Certiorari*.

Many members of the Chamber, including statutory lien holders and businesses that acquire obligations secured by statutory liens, have found that consumer reports are valuable collections tools when used to identify debtor assets and to locate debtors who otherwise may not be found. For this reason, the Chamber has a strong interest in ensuring that consumer reports remain available as collections tools under the FCRA without the need for its membership to bring lawsuits against consumers to reduce to judgment amounts that are already owed by operation of law or through assignment.

Left uncorrected, the Ninth Circuit's decision will prohibit an array of legitimate creditors from obtaining consumer reports for collections purposes. In addition, the decision will result in the overburdening of the courts of every jurisdiction as creditors are forced to initiate lawsuits to reduce their claims to a judgment to meet the Ninth Circuit's newly-created

judgment creditor requirement before they will have a permissible purpose to obtain consumer reports for collections purposes.

SUMMARY OF ARGUMENT

This Court should grant Experian's petition for writ of *certiorari* and summarily reverse to give effect to the plain language of the collections permissible purpose set forth in 15 U.S.C. § 1681b(a)(3)(A) and to preserve the uniformity of decisions among the circuit courts of appeals.

Alternatively, if summary reversal is not ordered, this Court should grant Experian's petition to fully consider the merits. Left unreviewed and uncorrected, the Ninth Circuit's decision will mean that holders of statutory liens, including governmental taxing authorities, and others seeking to collect obligations that were not reduced to judgment or were not the result of a consumer affirmatively seeking credit, will be deprived of an invaluable collections tool that they have relied upon for decades to locate delinquent or defaulting debtors and identify assets that may be available to pay an outstanding obligation. The increased transaction and collections costs incurred by these creditors will, necessarily, be borne by consumers who will pay more for products, services, taxes, fines and judgments.

ARGUMENT

CDIA and the Chamber agree with, and join in, the arguments of Experian that the Ninth Circuit's decision ignores the plain language of the collections permissible purpose set forth in 15 U.S.C. § 1681b(a)(3)(A), directly conflicts with the decisions of the courts of appeals in the sixth, seventh and eighth circuits[2] and conflicts with the well-settled, twenty-year old interpretation of the Federal Trade Commission, which is charged with enforcing the FCRA.[3]

Amici provide their separate brief to explain the importance of the question presented by the Ninth Circuit's decision to the millions of consumer report users who will be deprived of a valuable collections tool by the Ninth Circuit's insupportable narrowing of the FCRA's "collection of an account" permissible purpose found in 15 U.S.C. § 1681b(a)(3)(A).

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[2] *See,* Experian's Petition for Writ of *Certiorari* at 16-17 (discussing *Duncan v. Handmaker*, 149 F.3d 424, 428 (6th Cir. 1998); *Miller v. Walpoff & Abramson, LLP*, 309 F.App'x 40, 43 (7th Cir. 2009); *Phillips v. Grendahl,* 312 F.3d 357, 366 (8th Cir. 2002)).

[3] Experian's Petition at 17-19.

THE NINTH CIRCUIT COURT OF APPEALS' DECISION PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW THAT MUST BE ADDRESSED BY THIS COURT.

Experian's petition must be granted so that this Court may settle an important question of federal law and preserve the availability of consumer reports as a collections tool for millions of legitimate creditors, including statutory lien creditors, governmental taxing authorities, and other users of consumer reports to whom consumers become indebted without first applying for an extension of credit or being a defendant in a lawsuit.

1. The Ninth Circuit's decision is irreconcilable with the plain language of the FCRA and impermissibly narrows the scope of the collections permissible purpose.

FCRA section 1681b(a)(3)(A) permits a CRA to furnish a consumer report to a user of the report if the CRA has reason to believe that the person "intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the . . . collection of an account of . . . the consumer. . . ."[4] Twenty years ago, the FTC explained that this permissible purpose "permits . . . lien creditors to obtain

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[4] 15 U.S.C. § 1681b(a)(3)(A).

consumer reports on . . . individuals whose property is subject to a lien creditor's lien."[5]

Ignoring the plain language of the FCRA's permissible purpose provision, and the FTC's well-settled interpretation, the Ninth Circuit held that section 1681b(a)(3)(A) provides a permissible purpose for a creditor to obtain a consumer report for collections purposes *only if* the creditor reduced its claim to a judgment or the consumer was a "participant" in the credit transaction because she "initiated" the transaction or applied for credit.[6]

To reach its conclusion, which is unsupported by the language of the FCRA, contrary to its own prior decision, and in conflict with the decisions of three other federal circuit courts of appeal, the Ninth Circuit issued, withdrew, and re-issued multiple versions of its decision, amending and modifying its language along the way to remove the most obvious errors as they were identified by the petitioners when seeking a rehearing on the Ninth Circuit's decision. The dissenting judges from the Ninth Circuit's denial of the petitions for rehearing explained some of the Ninth Circuit's errors:

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[5] 16 C.F.R. Pt. 600 App., *Statement of General Policy or Interpretation; Commentary on the Fair Credit Reporting Act*, § 604(3)(E), cmt. 4 (May 4, 1990).

[6] *Pintos v. Pacific Creditors Assn., et al.*, 605 F.3d 665, 675-676 (9th Cir. 2010).

> I write separately to point out another problem with the [majority's] opinion: Its interpretation of the Fair Credit Reporting Act (FCRA) is foreclosed by the plain language of the statute.[7]

The Ninth Circuit's first iteration of its decision held that the 2003 Fair and Accurate Credit Transactions Act ("FACTA") amended the FCRA and, thereby, changed the law in the Circuit.[8] According to the Ninth Circuit, following the FACTA amendments, *lien* creditors no longer had a permissible purpose, under FCRA § 1681b(a)(3)(A), to obtain a consumer report for collections purposes.[9]

After the Ninth Circuit issued its decision, Experian filed its petition for rehearing, and CDIA filed its *amicus* brief in support of the petition, both of which explained that the circumstances giving rise to Pintos' complaint and the appeal all occurred on December 5, 2002, *fifteen months before* the relevant FACTA amendments became effective. The amendments, therefore, could not provide a basis for reevaluating the holding of *Hasbun*[10] upon which the

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[7] *Pintos v. Pacific Creditors Assn.*, 2010 U.S. App. LEXIS 10529, *4 (May 21, 2010) (dissenting opinion).

[8] *Pintos v. Pacific Creditors Assn.*, 504 F.3d 792, 799-800 (9th Cir. 2007) (withdrawn).

[9] *Id.*

[10] *Hasbun v. County of Los Angeles*, 323 F.3d 801 (9th Cir. 2003).

district court relied to hold that PCA had a permissible purpose to obtain Pintos' consumer report to collect the amount of the statutory lien. The Ninth Circuit withdrew its first decision.[11]

Moreover, even if the FACTA amendments had been effective at the time Pintos' lien obligation arose, those amendments did not modify the permissible purpose found in section 1681b(a)(3)(A) to limit its availability only to instances in which the consumer voluntarily applied for credit. A FACTA amendment defining "creditor" in a way that could have limited the availability of the permissible purpose found in section 1681b(a)(3)(A) to credit obligations *voluntarily assumed* by the consumer was, in fact, considered and rejected by the House of Representatives.[12]

The Ninth Circuit's most recent iteration of its opinion relies on statutory language the Ninth Circuit apparently overlooked in its prior decisions to now conclude that, notwithstanding the inapplicability of the FACTA amendments upon which the Ninth Circuit exclusively relied, section 1681b(a)(3)(A) provides a collections permissible purpose *only* for

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[11] *Pintos v. Pacific Creditors Assn., et al.*, 565 F.3d 1106, 1110 (9th Cir. 2009).

[12] *See*, Fair and Accurate Credit Transactions Act of 2003 § 2, H.R. 2622 (as introduced in the House) (proposing to amend the FCRA by incorporating the definition of "creditor" found in section 103 of the Truth in Lending Act, 15 U.S.C. § 1602(f), where "creditor" is defined to mean a person who "regularly extends . . . consumer credit" that is "payable by agreement.").

transactions in which the consumer initiates the credit transaction or participates in a way that demonstrates her intent to seek credit.[13] The Ninth Circuit's decision incorrectly reads the words "credit transaction" and "involve," as used in section 1681b(a)(3)(A), as a limitation on the availability of the collections permissible purpose.[14] This limitation improperly deprives an entire class of creditors of access to consumer reports for debt collections purposes.[15]

2. If not reversed, the Ninth Circuit's decision will unnecessarily burden the court system and harm millions of creditors and consumers as well as the consumer reporting agencies who provide consumer reports for collections purposes.

Unless corrected, the Ninth Circuit's decision will have devastating consequences for the holders of statutory liens, including governmental tax lien holders, and others seeking to collect obligations that were not reduced to a judgment or were not the

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[13] *Pintos*, 605 F.3d at 675; *see also*, Experian's Petition at 5-8 (discussing the Ninth Circuit's interpretation of these words).

[14] *Id.* at 675-676.

[15] The Ninth Circuit's decision also cannot be reconciled with section 1681b(c) which contemplates that the section 1681b(a)(3)(A) permissible purpose *includes* debts arising from transactions that consumers have not initiated. *See*, Experian's Petition at 11-14 for a fuller discussion of this issue.

result of a consumer affirmatively seeking credit. These creditors rely on the availability of consumer reports to quickly locate debtors, determine their ability to pay, and facilitate collection efforts. Without the ability to use consumer reports, such skip-tracing and collection will become more complicated, expensive and time-consuming. As the dissenting judges recognized, by increasing the collections burden, the Ninth Circuit's decision harms even the consumers who are the subject of lien creditors' collections efforts:

> Use of credit reports expedites collections, reducing collection costs, and *because such costs may be shifted to consumers, permitting the credit reports to be relied upon by creditors may decrease costs to citizens* who are so unfortunate as to leave their unregistered cars parked on the street and subject to towing. *If a collection agency standing in the shoes of the towing company is not allowed to request and see a credit report, then the costs of collection are going to increase, then correspondingly the costs of towing are going to increase, and finally the scope of fines for violators would likely be increased.* In my view, permitting credit reports to go to creditors, whether they have a judgment or not, will be less expensive for both debtors and creditors.[16]

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[16] *Pintos*, 2010 U.S. App. LEXIS 10529 *7-8.

Under the Ninth Circuit's decision, the burden on the judicial system will also increase as lienholders and non-traditional creditors file tens-of-thousands of otherwise unnecessary complaints in the courts of every jurisdiction to obtain judgments so that they may be considered "creditors," under the Ninth Circuit's decision and, therefore, entitled to the full panoply of collections tools, including consumer reports.

These lawsuits would, self-evidently, be a waste of limited judicial resources. The statutes giving rise to the liens already establish the existence and the amount of the obligation owed by the consumer. But the Ninth Circuit believes that a court's judgment for the same amount, under the same statute, is necessary before the required debtor-creditor relationship exists that will support the use of consumer reports under the section 1681b(a)(3)(A) permissible purpose.[17] For the court, this is apparently true even if the judgment is a default judgment and the consumer never responds to the complaint. According to the Ninth Circuit, the fact of the judgment alone transforms a statutory obligation or other debt into a "credit transaction" that "involves" the consumer and, therefore, provides a permissible purpose to obtain a

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[17] *Pintos*, 605 F.3d at 676 ("If a debt has been judicially established, there is a 'credit transaction involving the consumer' no matter how it arose. The obligation is established as a matter of law, and the statute is satisfied.").

consumer report under section 1681b(a)(3)(A).[18] The Ninth Circuit's newly-created procedural requirement – that statutory liens and other non-traditional credit obligations must be reduced to judgment to constitute a credit obligation that may be collected for purposes of section 1681b(a)(3)(A) – is found nowhere in the FCRA.

Not only will the Ninth Circuit's decision unnecessarily burden the judicial system, it will also undermine the efficacy of well-established governmental procedures. The facts of this case alone begin to illustrate the harmful consequences flowing from the Ninth Circuit's decision. The police directed P&S Towing to tow Pintos' vehicle because its registration was expired.[19] By operation of California law, the towing company:

> [H]as a lien . . . for compensation to which the person is legally entitled for towing, storage, or labor associated with recovery or load salvage of any vehicle subject to registration that has been authorized to be removed by a public agency. . . . The lien is deemed to arise on the date of possession of the vehicle.[20]

The towing company's incentive to respond to the police department's request for assistance was the

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[18] *Id.* at 675-676.

[19] *Id.* at 673.

[20] Cal. Civ. Code § 3068.1(a).

existence of the statutory lien which ensured that, even if the vehicle was never recovered by the owner, the towing company would be paid for the services it provided because it could sell the vehicle after a statutorily defined period.[21] By California law, the towing company was entitled to recover this amount *without having to file a lawsuit and obtain a judgment* against the vehicle owner.

Under the Ninth Circuit's decision, the towing company may attempt to collect the lien amount, but it is deprived of an invaluable collection tool, the vehicle owner's consumer report, unless the company first files a lawsuit and obtains a judgment against the vehicle owner.[22] Only then, according to the Ninth Circuit is the lienholder a "creditor" for FCRA purposes who can obtain a consumer report for collections purposes.[23] The Ninth Circuit justifies this result by declaring, without explanation, that the judgment gives rise to a "'credit transaction involving the consumer' . . . no matter how it [the debt] arose" and establishes the "obligation . . . as a matter of law. . . ."[24] Of course, the statute creating the lien in favor of the lienholder (the towing company in this case) also establishes the obligation by operation of law. It is difficult to understand, *and the Ninth*

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[21] Cal. Civ. Code § 3068.1(b)

[22] *Pintos*, 605 F.3d at 676.

[23] *Id.* ("a judgment creditor is authorized under the statute to obtain a credit report in connection with collection efforts.")

[24] *Id.*

Circuit does not explain, how the existence of a "credit transaction involving the consumer" turns on whether the debt has been reduced to judgment.

The impact of the Ninth Circuit's decision is not limited to the potential littering of streets with illegally parked vehicles that will not be towed. It extends to other creditors' ability to collect other consumer debts. Under the Ninth Circuit's reasoning, governmental taxing authorities may not use consumer reports to collect unpaid taxes unless a judgment is first obtained. The assignees of receivables that do not arise from consumer-initiated credit transactions may not use consumer reports to collect the amounts they are owed. These uncollected tax lien amounts and consumer debts mean reduced revenue and greater transaction costs for governments and other non-traditional creditors. These costs are ultimately borne by taxpayers and consumers who must make up the losses through increased taxes and higher prices for goods and services. The Ninth Circuit's decision will also deprive CRAs of the revenue they would otherwise earn in providing consumer reports to assist lien creditors and other non-traditional creditors in their collection efforts.

Left uncorrected, the Ninth Circuit's decision means that any service or materials provider who obtains a statutory lien must, before it provides its products or services, consider: (i) whether it will respond to a request for service giving rise to a statutory lien when its collection efforts will be hampered because no consumer report can be obtained; and (ii)

whether the amount of the statutory lien will be sufficient to cover not only the cost of the service or materials, but also the court costs and attorneys' fees for the lawsuit that will have to be filed to obtain a judgment the Ninth Circuit believes is a prerequisite to "creditor" status under section 1681b(a)(3)(A). Such considerations will, necessarily, reduce the number of businesses (*e.g.*, towing companies) offering such services to governmental agencies and will, as the dissent recognized, increase the costs ultimately paid by consumers for products, services, fines, and judgments.

CONCLUSION

To correct the Ninth Circuit's clear error and, thereby, avoid the harms to millions of businesses, governmental taxing authorities, non-traditional creditors, consumers and CRAs that will be caused by the Ninth Circuit's unwarranted narrowing of the availability of the FCRA's collections permissible purpose, Experian's petition for writ of *certiorari* must be granted and the Ninth Circuit's decision

summarily reversed or, in the alternative, set for full consideration on the merits.

Respectfully submitted,

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